No. 04-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAN HIMMELFARB
Assistant to the Solicitor General

ELIZABETH A. OLSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched.

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The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-19a) is reported at 377 F.3d 1072. An order of the court of appeals amending its opinion and denying rehearing (App., *infra*, 1a-2a) is reported at 389 F.3d 1306. The memoranda and orders of the district court denying respondent's motion to suppress (App., *infra*, 29a-46a) and denying his motion for reconsideration (App., *infra*, 20a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2004, and amended on December 6, 2004. A petition for rehearing was denied on December 6, 2004. On February 24, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 5, 2005, and on March 23, 2005, she further extended the time within which to file a petition for a writ of certiorari to and including May 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Rule 41 of the Federal Rules of Criminal Procedure is reproduced at App., *infra*, 78a-83a.

STATEMENT

Following the denial of a suppression motion and a conditional guilty plea in the United States District Court for the Eastern District of California, respondent was convicted of receiving in the mail a visual depiction whose production involved the use of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release, and a fine of $3700. The court of appeals re-

versed, holding that the search of respondent's home violated the Fourth Amendment.

1. An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 362 (3d ed. 1996). An anticipatory search warrant is most commonly issued in a case involving "the anticipated mail delivery to a certain address of a package known or reasonably believed to contain some form of contraband," and execution of the warrant ordinarily occurs "after the police determine * * * that the predicted delivery has actually occurred." *Id.* at 362-363. Because the Fourth Amendment requires probable cause to believe that evidence of a crime "can likely be found at the described locus *at the time of the search*," not at the time the warrant is issued, *United States* v. *Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993), the federal courts of appeals have uniformly concluded that anticipatory search warrants are constitutionally permissible, see, *e.g.*, *United States* v. *Santa*, 236 F.3d 662, 671-672 (11th Cir. 2000) (citing cases).

2. a. On December 20, 2001, respondent contacted a website that offered for sale videotapes depicting minors engaged in sex acts. App., *infra*, 29a-30a, 59a-60a. The website was operated by an undercover United States Postal Inspector. *Ibid.* A week later, respondent placed an e-mail order for a videotape titled "Lolita Mother and Daughter," which depicted (according to the website) "a lovely young girl"—"if she's over 10 I'd be shocked"—engaged in sex acts with "Mom." *Id.* at 4a, 30a, 63a-64a. On February 5, 2002, the postal inspector received an envelope in his undercover post office box. *Id.* at 30a, 67a. The envelope

contained $45 in cash and a handwritten letter reading: "I hope this makes it to you please send film asap thanks Jeff Grubbs 1199 Park Tarrace [sic] Dr., Galt, CA 95632." *Id.* at 4a, 30a, 67a (brackets in original).

b. On April 17, 2002, Postal Inspector Gary Welsh applied to a magistrate judge in the Eastern District of California for an anticipatory warrant to search respondent's home after the delivery of the videotape. App., *infra*, 4a, 30a, 52a-77a. The triggering condition for the search was described in two different places in the supporting affidavit. Paragraph 14 of the affidavit stated that the warrant would be executed if respondent "or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632." *Id.* at 57a. Paragraph 61 stated that the warrant would not be executed "unless and until the parcel has been received by a person(s) and has been physically taken into the residence located at 1199 Park Terrace Drive, Galt, CA 95632." *Id.* at 72a. Paragraph 61 went on to say that the warrant would be executed "[a]t that time, and not before." *Ibid.* "Attachment A" to the affidavit was a detailed description of the property to be searched, and "Attachment B" was a detailed list of the items to be seized. *Id.* at 74a-77a.

On the basis of the affidavit, the magistrate judge issued the warrant. App., *infra*, 4a, 30a, 47a-51a. The warrant had the same two attachments as the affidavit (describing the property to be searched and the items to be seized), and directed that it be executed within 10 days (*i.e.*, on or before April 27, 2002). *Id.* at 7a-8a, 47a-51a. At the top of the warrant, the word "ANTICIPATORY" was handwritten above the pre-printed words "SEARCH WARRANT," but the warrant itself

did not describe the triggering event. *Id.* at 5a, 30a, 47a.

c. On April 19, 2002, at approximately 7:20 a.m., an undercover postal inspector delivered the videotape to respondent's house. Respondent's wife accepted delivery, signed for the package, and took it inside. A few minutes later, postal inspectors saw respondent leaving and told him to stay where he was. The warrant was then executed. Shortly after the search began, Inspector Welsh said to respondent, "You know why we're here." Respondent said that he did and told Inspector Welsh that the package was in the garage. App., *infra*, 6a-7a, 31a.

At approximately 7:50 a.m., respondent went back into the house with Inspector Welsh, who gave respondent a copy of the warrant. Although the postal inspectors had a copy of the supporting affidavit with them, it was not presented to respondent and it was not left at his house. App., *infra*, 7a-8a, 31a-32a.

After they went inside, Inspector Welsh advised respondent of his rights, and respondent agreed to be interviewed. Respondent also consented to a search of his computer, CD-ROMs, and diskettes. During the interview, respondent admitted that he had ordered the videotape and that he had other child pornography. Respondent was then placed under arrest. The postal inspectors seized the videotape and a number of other items. App., *infra*, 8a, 32a.

3. A grand jury in the Eastern District of California returned a one-count indictment charging respondent with receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2). App., *infra*, 8a-9a, 32a. Respondent filed a motion to suppress the physical evidence seized from his house and the statements he made to Inspector Welsh. *Id.* at 9a, 29a. One of the claims in

respondent's motion was that "the agents' failure to present the affidavit to [him] or his wife rendered the warrant inoperative," because the warrant did not describe the triggering event. *Id.* at 9a.

After an evidentiary hearing, the district court denied the motion to suppress. App., *infra*, 29a-46a. In rejecting the claim that suppression was required because respondent had not been given a copy of the affidavit (*id.* at 36a-39a), the court applied the Ninth Circuit's decision in *United States* v. *Hotal*, 143 F.3d 1223 (1998). As the district court observed (App., *infra*, 37a), that case held that "an anticipatory search warrant must either on its face or on the face of the accompanying affidavit[] clearly, expressly, and narrowly specify the triggering event," and that the document specifying the triggering event must be in the "immediate possession" of those conducting the search. 143 F.3d at 1227. The district court concluded that the requirements of *Hotal* were satisfied, because "the triggering event [wa]s specified in the affidavit," "[t]he warrant incorporated the affidavit," and "[t]he warrant and affidavit were * * * in the immediate possession of the officers while they searched [respondent's] residence." App., *infra*, 37a. The court rejected respondent's contention that *Hotal* "requires the affidavit to be presented with the warrant to the people whose property is being searched." *Id.* at 38a.[1]

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[1] The district court also ruled that there was probable cause for the issuance of the warrant insofar as it authorized a search for the videotape (App., *infra*, 32a-35a); that the postal inspectors' failure to provide a copy of the warrant at the outset of the search did not require suppression under Rule 41 of the Federal Rules of Criminal Procedure (App., *infra*, 39a-44a); and that respondent's statements were not obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (App., *infra*, 44a-46a). In his suppression

Respondent filed a motion for reconsideration, which the district court denied. App., *infra*, 20a-28a. Respondent then entered a conditional guilty plea (see Fed. R. Crim. P. 11(a)(2)) to the sole charge in the indictment, reserving his right to appeal the denial of his suppression motion. App., *infra*, 10a. The district court sentenced him to a prison term of 33 months. *Ibid.*

4. The court of appeals reversed the denial of respondent's suppression motion and remanded the case to give respondent an opportunity to withdraw his plea. App., *infra*, 1a, 3a-19a.

In an opinion by Judge Reinhardt, the court first observed that the Fourth Amendment requires that warrants "particularly describ[e] the place to be searched[] and the persons or things to be seized." App., *infra*, 10a. The court went on to say that a warrant that violates this "particularity requirement," and is therefore "facially defective," can be "cured" by an affidavit that (a) is "sufficiently incorporated" into the warrant and (b) "accompanies" the warrant. *Id.* at 12a. But a defect in the warrant "is not cured," the court said, if the affidavit "is not shown to the persons being subjected to the search." *Ibid.*

Relying on the Ninth Circuit's decision in *Hotal*, the court then explained that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant." App., *infra*, 13a. Thus, the rule in the Ninth

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motion, respondent also contended that there was no probable cause for the issuance of the warrant insofar as it authorized a search for items other than the videotape and that he had not validly consented to the search of his computer, but the court ruled that those claims were moot, because the government did not intend to offer at trial any physical evidence other than the videotape. *Id.* at 35a-36a.

Circuit is that, "when a warrant's execution is dependent on the occurrence of one or more conditions, the warrant itself must state the conditions precedent to its execution and these conditions must be clear, explicit, and narrow." *Ibid.* (quoting *Hotal*, 143 F.3d at 1226). The rationale for the rule, the court said, is that "a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings," because, "inevitably, the executing agents are called upon to determine when and where the triggering event specified in the warrant has actually occurred." *Ibid.* (quoting *Hotal*, 143 F.3d at 1226, in turn quoting *Ricciardelli*, 998 F.2d at 12)). In the Ninth Circuit's view, application of the particularity requirement is "the only way effectively to safeguard against unreasonable and unbounded searches." *Ibid.* (quoting *Hotal*, 143 F.3d at 1227).

Combining these two principles—that the Fourth Amendment's particularity requirement is violated if the triggering condition is not described in an anticipatory search warrant, and that a warrant that violates the particularity requirement can be "cured" by an incorporated affidavit that "accompanies" the warrant —the court of appeals framed the question presented as "whether a curative affidavit that contains the conditions precedent to an anticipatory search actually 'accompanies' the warrant when the affidavit is not shown to the person or persons being subjected to the search." App., *infra*, 14a. The court answered that question no. It held that officers must "present any curative document—be it an affidavit, attachment, or other instrument that supplies the particularity and specificity demanded by the Fourth Amendment—to the persons whose property is to be subjected to the search." *Id.* at 15a. Unless the curative document is

presented, the court said, "individuals w[ill] 'stand [no] real chance of policing the officers' conduct,'" because "they w[ill] have no opportunity to check whether the triggering events by which the impartial magistrate has limited the officers' discretion have actually occurred." *Ibid.* (quoting *Ramirez* v. *Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002), aff'd *sub nom. Groh* v. *Ramirez*, 540 U.S. 551 (2004)).

Under that analysis, the court concluded that the warrant in this case was "inoperative," and that the search was therefore "illegal," because "there is no dispute that the officers failed to present the affidavit—the only document in which the triggering conditions were listed—to [respondent] or [his wife]." App., *infra*, 16a. Nor did it matter, the court said, that "the search ultimately may have been conducted in a manner consistent with the application for the warrant." *Ibid.* The court explained that, "[i]f a warrant fails for lack of particularity or specificity, it is simply unconstitutional—without regard to what actually occurred." *Ibid.* The result, in the court's view, was that the officers in this case "in effect[] conducted a warrantless search." *Id.* at 17a. The court therefore held that all evidence, including the videotape and respondent's statements, must be suppressed. *Id.* at 17a & n.10.[2]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has interpreted the Fourth Amendment to require suppression whenever the triggering condition for an anticipatory search warrant is

[2] Respondent also raised in the court of appeals the Rule 41 and *Miranda* claims he had raised in the district court (Resp. C.A. Br. 17-18, 31-34), but the Ninth Circuit did not reach those claims (App., *infra*, 4a n.1, 7a n.3, 16a n.9).

not specified either in the warrant itself or in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. That rule is incorrect; it has been rejected by five other circuits; and it has recurring importance in the administration of the criminal justice system. This Court should therefore grant certiorari to review the Ninth Circuit's decision.

A. The Ninth Circuit's Decision Is Incorrect

1. a. As this Court observed last Term, the Warrant Clause of the Fourth Amendment has "four[] requirement[s]." *Groh* v. *Ramirez*, 540 U.S. 551, 557 (2004). It provides that "no Warrants shall issue, but [1] upon probable cause, [2] supported by Oath or affirmation, and particularly describing [3] the place to be searched, and [4] the persons or things to be seized." U.S. Const. Amend. IV. The fundamental flaw in the Ninth Circuit's rule is that it adds a fifth requirement. Contrary to the court of appeals' holding that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant" (App., *infra*, 13a), the text of the Warrant Clause makes clear that the particularity requirement does *not* apply to those conditions. The only items that the Fourth Amendment requires to be "particularly describ[ed]" in a warrant are "the place to be searched" and "the persons or things to be seized." The triggering condition has nothing to do with where a search may take place or what the officers may search for.

Instead, the triggering condition is "the predicted future event[] that the magistrate judge determines will create sufficient probable cause to justify the search." App., *infra*, 13a. That is not the concern of the

particularity requirement. Rather, the triggering condition is relevant to the requirement that the warrant be based on probable cause and supported by sworn testimony. Accordingly, while the Fourth Amendment requires that the triggering condition be described in the supporting affidavit, which is made under "Oath" and submitted to the magistrate judge to establish "probable cause," it does not require that the triggering condition be described in the warrant, which must "particularly describ[e]" only the "place to be searched" and the "things to be seized." Since the affidavit in this case described the probable cause for the search, including the triggering condition (*id.* at 57a, 72a), and the warrant (and its attachments) described with particularity the place to be searched and the items to be seized (*id.* at 47a-51a), the requirements of the Warrant Clause were satisfied.

b. The rule adopted by the Ninth Circuit is based, not on the text of the Fourth Amendment (or its history), but on non-constitutional policy arguments. In *Hotal*, for example, the court said that, insofar as it applies to the items to be seized, the Fourth Amendment's particularity requirement "serve[s] the purposes of, first, ensuring that the 'discretion of the officers executing the warrant is limited,' and second, informing the person subject to the search of what items are authorized to be seized." 143 F.3d at 1227 (quoting *United States* v. *Towne*, 997 F.2d 537, 548 (9th Cir. 1993)). From that statement, the court extrapolated that "[i]t is equally important to ensure that all parties be advised when the search may first take place, and the conditions upon the occurrence of which the search is authorized and may lawfully be instituted." *Ibid.* The text of the Fourth Amendment, however, does not require warrants to describe with particularity

"when the search may first take place" (*ibid.*), and that omission is telling evidence that those who framed and ratified the Bill of Rights did not believe that advising a person of that fact was "equally [as] important" (*ibid.*) as advising him of what property may be searched and what things may be seized. Even if the Ninth Circuit could point to some evidence that the framers or ratifiers of the Fourth Amendment shared the court's view (something it has not done), the evidence would have little relevance given the specificity of the constitutional text, which states that it is "the place to be searched" and "the persons or things to be seized" that must be described with particularity.

In *Hotal* the Ninth Circuit also said, and in this case it repeated, that applying the particularity requirement to the triggering condition for an anticipatory search warrant is "the only way effectively to safeguard against unreasonable and unbounded searches." 143 F.3d at 1227; App., *infra*, 13a. In a similar vein, the decision below reasoned that, if residents were not made aware of the triggering condition at the time of the search, they "would 'stand [no] real chance of policing the officers' conduct.'" *Id.* at 15a (quoting *Ramirez*, 298 F.3d at 1027). This second policy argument likewise provides no basis for ignoring the text of the Warrant Clause, and it is based on an incorrect premise. Informing a person whose property is being searched of the triggering condition is manifestly not the only (or even the most) effective way to prevent unreasonable searches. If a search took place before the occurrence of a triggering event described to the magistrate in an affidavit, probable cause would be lacking and the search would likely be unreasonable (and therefore illegal). The appropriate way to resolve a dispute about probable cause, however, is through litigation, not by

confronting law enforcement agents who are poised to execute a warrant. The best "safeguard against unreasonable * * * searches" (*id.* at 13a) is a motion to suppress (in a criminal case) or a claim for damages (in a civil case), not, as the Ninth Circuit has put it, "challeng[ing] officers," at the time of the search, who are believed to have "exceeded the limits" of their authority (*Ramirez*, 298 F.3d at 1027).

2. If there is any defect in an anticipatory search warrant that authorizes a search *from the date of the warrant's issuance* until some future date, without requiring that the search take place only after the triggering event, the defect is that the warrant is overbroad—not with respect to the place to be searched or the items to be seized, but with respect to the time at which the search may occur. That is because the warrant, on its face, authorizes a search before the triggering event has occurred, and thus before there is probable cause for the search. In a case of that type, however, the warrant is not invalid on its face, and suppression is not an appropriate remedy for overbreadth if the search *in fact* occurred *after* the triggering event.

As a general matter, when a magistrate judge "issue[s] a warrant authorizing a search and seizure which exceeds the ambit of the probable cause showing made to him," courts sever the parts of the warrant "that are invalid for lack of probable cause" and suppress only the evidence "seized under the authority of those parts." *United States* v. *Christine*, 687 F.2d 749, 753-754 (3d Cir. 1982). The Ninth Circuit itself has recognized that principle. *E.g.*, *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857-858 (1991). Insofar as the warrant in this case authorized a search of respondent's residence both (a) from the date

of the warrant's issuance until the occurrence of the triggering event and (b) from the occurrence of the triggering event until ten days after the warrant's issuance (see App., *infra*, 47a),[3] the appropriate remedy is to sever the portion of the warrant that authorized a search before the triggering event. And since no search occurred before the triggering event, no evidence was improperly obtained and suppression is not required.

The situation is analogous to one in which a traditional (*i.e.*, non-anticipatory) warrant authorizes the search of two apartments in a building (A and B) even though probable cause was shown only as to apartment B. If the officers in such a case searched both apartments, the remedy would be to sever the warrant insofar as it authorized a search of apartment A and to suppress the evidence obtained from apartment A. There would be no justification for suppressing the evidence obtained from apartment B. See, *e.g.*, *United States* v. *Pitts*, 173 F.3d 677, 679-681 (8th Cir. 1999) (where warrant authorized search of "713-715 East Lake Street," evidence seized from 715 East Lake Street was admissible "even if police lacked probable cause to search 713 East Lake Street," because "police clearly possessed probable cause to search" 715 East Lake Street). If, instead, the officers in such a case searched only apartment B, no suppression of any evidence would be required, because the only apartment that was searched was the one as to which there was a showing of probable cause. The same is true in a case,

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[3] Rule 41 of the Federal Rules of Criminal Procedure requires that a search warrant "command the officer" to "execute the warrant within a specified time no longer than 10 days." Fed. R. Crim. P. 41(e)(2)(A). The warrant in this case conformed to Rule 41. See App., *infra*, 47a.

like this one, where the anticipatory warrant, on its face, authorized a search at any time between the warrant's issuance and ten days thereafter, there was probable cause to search only after the triggering event occurred, and the search did not take place until after that occurrence.

B. The Ninth Circuit's Decision Conflicts With Decisions Of Five Other Circuits

1. The Ninth Circuit requires suppression when the triggering event for an anticipatory search warrant is not described either in the warrant itself or in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. That rule has been rejected by the Second, Sixth, Seventh, Eighth, and Tenth Circuits.

In *United States* v. *Rey*, 923 F.2d 1217 (1991), the Sixth Circuit affirmed the denial of a motion to suppress where "the affidavit requested a warrant for a search 'subsequent to the delivery of the package tomorrow,'" but the warrant itself "did not specify that the search could only be executed after the controlled delivery had been made." *Id.* at 1221. The court observed that "the warrant would have been void" if "the controlled delivery had not occurred," but held that "the warrant's silence" with respect to the triggering condition "does *not* render it void," even if "it may [have] be[en] preferable" to include the condition in the warrant. *Ibid.* (emphasis added).

In *United States* v. *Tagbering*, 985 F.2d 946 (1993), the Eighth Circuit followed the Sixth Circuit. *Tagbering* rejected, on two alternative grounds, the argument that "the warrant was invalid because it did not expressly condition the search upon the controlled delivery." *Id.* at 950. The court held that "the search

warrant, fairly construed, did contain this condition," and that, even if it did not, the Constitution does not "require[] that th[e] limitation be written into the warrant itself." *Ibid.* Citing *Rey*, the Eighth Circuit observed that suppression would have been appropriate only if "the warrant [had been] executed before the controlled delivery occur[red]." *Ibid.*

In *United States* v. *Moetamedi*, 46 F.3d 225 (1995), the Second Circuit followed the Eighth Circuit. "[A]dopt[ing] the reasoning of *Tagbering*," the court held that "an anticipatory warrant is valid even though it does not state on its face the conditions precedent for its execution." *Id.* at 229. Even if "the most efficient way to ensure than an anticipatory warrant is properly executed is to include the conditions for its execution in the warrant," the court said, there is no "Fourth Amendment violation requiring suppression" when "(1) 'clear, explicit, and narrowly drawn' conditions for the execution of the warrant are contained in the affidavit" and "(2) those conditions are actually satisfied before the warrant is executed." *Ibid.* (quoting *United States* v. *Garcia*, 882 F.2d 699, 703-704 (2d Cir.), cert. denied, 493 U.S. 943 (1989)).

In *United States* v. *Hugoboom*, 112 F.3d 1081 (1997), the Tenth Circuit followed the Second Circuit. In that case, the triggering condition was described in the affidavit but not the warrant, and the Tenth Circuit rejected the argument that "such omission is constitutional error." *Id.* at 1087. Quoting *Moetamedi*, the court said that the Fourth Amendment is satisfied when the triggering event is "stated in the affidavit that solicits the warrant, accepted by the issuing magistrate, and actually satisfied in the execution of the warrant." *Ibid.* (quoting 46 F.3d at 229).

In *United States* v. *Dennis*, 115 F.3d 524 (1997), the Seventh Circuit followed the Second Circuit as well. The court held that "the anticipatory warrant was valid even though it did not list the conditions precedent to execution on its face or append a copy of the supporting affidavit." *Id.* at 529. Like the Second Circuit in *Moetamedi*, the Seventh Circuit found no Fourth Amendment violation because the affidavit "contained satisfactory conditions," the magistrate judge "read and considered the affidavit in issuing the warrant," and "the officers complied with the conditions precedent in executing the warrant." *Ibid.*

The conflict between the Ninth Circuit, on the one hand, and the Second, Sixth, Seventh, Eighth, and Tenth Circuits, on the other, was acknowledged both in *Hotal* (the Ninth Circuit decision on which the court of appeals relied here) and in a subsequent decision of the Tenth Circuit. In *Hotal*, the Ninth Circuit observed that "[o]ther circuits have directly addressed" the question whether "an anticipatory search warrant lacks sufficient particularity when it does not identify the event on which the execution of the warrant is conditioned." 143 F.3d at 1226. Citing the decisions discussed above, the court went on to say that the Second, Sixth, Seventh, Eighth, and Tenth Circuits have all held—contrary to the Ninth Circuit's conclusion in *Hotal*—that an anticipatory warrant's failure "to state on its face the conditions necessary for its execution" does not "constitute a Fourth Amendment violation." *Ibid.* Several years later, in *United States* v. *Hernandez-Rodriguez*, 352 F.3d 1325 (2003), the Tenth Circuit rejected "the rule of the Ninth Circuit," announced in *Hotal*, that "the condition for anticipatory warrants must be set forth on the face of the warrant." *Id.* at 1332. The court explained that adoption of that

rule "is precluded by" its decision in *Hugoboom*, which, the court added, "is in accord with" the decisions of the Second, Sixth, Seventh, and Eighth Circuits discussed above. *Id.* at 1332-1333.

2. In adopting, in *Hotal*, the rule at issue here, the Ninth Circuit (143 F.3d at 1226-1227) purported to follow two decisions of the First Circuit: *United States* v. *Ricciardelli*, 998 F.2d 8 (1993), and *United States* v. *Gendron*, 18 F.3d 955 (Breyer, J.), cert. denied, 513 U.S. 1051 (1994). While it is possible to read those decisions as requiring that the triggering event be described in an anticipatory search warrant, the First Circuit cases involved a different issue.

In *Ricciardelli*, the triggering event *was* described in the warrant, which authorized a search of the defendant's home after a package containing child pornography was received by the defendant (not after it was received at his home). 998 F.2d at 9. The warrant was executed after the defendant picked up the package at a post office and brought it home. *Id.* at 10. The court suppressed the evidence because there was not a sufficient connection between the triggering event and the place to be searched. *Id.* at 12-14. In particular, the court held that "the event that triggers the search must be the delivery of the contraband *to the premises to be searched*." *Id.* at 13. The court relied on the principle that contraband must be "on a sure and irreversible course to its destination"—a principle, the court said, that ensures that the contraband "will almost certainly be located there at the time of the search, thus fulfilling the requirement of future probable cause." *Id.* at 12-13. The court also said that "it is the triggering condition of [the defendant's] receipt of the videotape at home" that eliminates the possibility that he was "a runner for some other person, or simply an internuncio," thereby

"producing probable cause to believe that [he] is a collector of child pornography and, hence, that his residence likely contains evidence of his criminality." *Id.* at 14.

Ricciardelli therefore can be viewed as resting, not on the Fourth Amendment's particularity requirement, but on its requirement of probable cause. It is not clear from the opinion whether a more specific triggering condition, tied to the defendant's receipt of the contraband at his home, was set forth in the supporting affidavit. And even if such a condition was set forth in the affidavit, the search, in fact, did not take place after the defendant received the package at his home. Accordingly, *Ricciardelli* does not rule out the possibility that suppression would not be required if a proper triggering event were set forth in the affidavit and the search occurred after the triggering event.

In *Gendron*, too, the triggering event, which was "virtually identical" to the one at issue in *Ricciardelli*, 18 F.3d at 966, was described in the warrant itself. *Id.* at 965. Unlike the defendant in *Ricciardelli*, however, the defendant in *Gendron* apparently received the contraband at his home. *Id.* at 967. And contrary to its conclusion in *Ricciardelli*, the court in *Gendron* held that suppression was not appropriate, *id.* at 964-967, because the triggering event was described with "sufficient clarity," *id.* at 965. Since the warrant itself in *Gendron* described the triggering event and the court held the description adequate, the First Circuit did not consider the question whether suppression would be required if the triggering condition was adequately described only in the supporting affidavit. Like *Ricciardelli*, therefore, *Gendron* is not inconsistent with the decisions of the Second, Sixth, Seventh, Eighth, and Tenth Circuits discussed above, and it does

not contribute to the conflict in authority. In any event, neither *Gendron* nor *Ricciardelli* provides a valid rationale for suppression when the triggering event was adequately described in the affidavit and the search occurred after the triggering event.

C. The Ninth Circuit's Decision Involves An Issue Of Recurring Importance To The Administration Of The Criminal Justice System

In the Ninth Circuit, searches pursuant to an anticipatory search warrant are illegal, and evidence must be suppressed, in any case in which the triggering event is not described either in the warrant itself or in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. As a consequence of that rule, there are cases where the government must proceed to trial without the most probative evidence of the defendant's guilt, agree to a guilty plea on terms highly favorable to the defendant, or forgo prosecution altogether. Indeed, if the court of appeals' decision in this case stands, the charges against respondent may have to be dismissed, since the court determined that both the videotape and respondent's statements must be suppressed. Because anticipatory search warrants are routinely used by law enforcement officers in connection with the controlled delivery of drugs, child pornography, and other contraband, and because approximately 23% of federal criminal cases are brought in the Ninth Circuit, see Administrative Office of the U.S. Courts, *2004 Annual Report of the Director: Judicial Business of the United States Courts* 181-183 (Table D. Cases), the rule at issue has a significant effect on the administration of the criminal justice system.

As then Chief Judge Breyer observed in *Gendron*, anticipatory warrants may offer "greater, not lesser, protection against unreasonable invasion of a citizen's privacy," because the likely alternative to their use is that law enforcement officers would "simply conduct the search (justified by 'exigent circumstances') without any warrant at all." 18 F.3d at 965. Insofar as it creates an incentive to avoid the use of anticipatory warrants, therefore, the Ninth Circuit's rule would ultimately disserve the privacy interests of citizens as well as the law enforcement interests of the government.

It is true that investigators and prosecutors in the Ninth Circuit can avoid suppression by ensuring that the triggering event is described in the warrant—or, if it is not, by ensuring that the supporting affidavit is both incorporated into the warrant and left with the person whose property is being searched. Even if federal investigators and prosecutors in the Ninth Circuit could be trained to take those steps, however, there would still be cases in which the Ninth Circuit's rule would undermine federal prosecutions. That is true for at least two reasons.

First, prosecutions in federal court, including those involving drugs and child pornography, often result from investigations conducted at the state or local level. In many cases, therefore, the evidence on which federal prosecutors rely is the result of an anticipatory warrant obtained, and a search conducted, by state or local law enforcement officers. While it may be possible, through training, to minimize the instances in which *federal* anticipatory search warrants omit the triggering event, and in which *federal* officers executing anticipatory warrants do not leave an incorporated affidavit at the search location, there is no practical way for the federal

government to ensure that every law enforcement agency and prosecutor's office in every state and locality within the Ninth Circuit adheres to that court's rule. That is especially true given that state trial and appellate courts are not bound by decisions of the Ninth Circuit. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 58 n.11 (1997); *Lockhart* v. *Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring).

Second, the nature of criminal investigations is such that search warrants must often be prepared in haste. As a consequence, even information that is indisputably required by the Fourth Amendment is sometimes omitted from warrants through inadvertence. See, *e.g.*, *Groh* v. *Ramirez*, 540 U.S. at 567 (Kennedy, J., dissenting) (items to be seized). Because obtaining and executing a search warrant is a complex enough undertaking as it is, the government has a substantial interest in avoiding the need to satisfy unjustified requirements whose violation is punishable by suppression. The Warrant Clause itself strikes the proper balance, and prosecutions should not be undermined by a failure to comply assiduously with additional judge-made rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAN HIMMELFARB
Assistant to the Solicitor General

ELIZABETH A. OLSON
Attorney

APRIL 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 03-10311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JEFFREY GRUBBS, DEFENDANT-APPELLANT

Filed: July 26, 2004
Amended: Dec. 6, 2004

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Chief Judge.*

ORDER

The majority opinion filed July 26, 2004, slip op. 9965, and appearing at 377 F.3d 1072 (9th Cir.2004), is hereby amended as follows:

1. Last line on slip op. 9976 [377 F.3d at 1077] and continuing onto slip op. 9977 [377 F.3d at 1077]: after "(a)," replace "is incorporated within the four corners of the warrant" with "is sufficiently incorporated into the warrant."

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* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

With this amendment, the panel has voted to deny the petition for panel rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc, and Judge B. Fletcher and Judge Restani so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing or petitions for rehearing en banc shall be entertained.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 03-10311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JEFFREY GRUBBS, DEFENDANT-APPELLANT

Filed: July 26, 2004

OPINION

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Chief Judge.*

REINHARDT, Circuit Judge:

Jeffrey Grubbs appeals following his conditional guilty plea on a charge of receiving a visual depiction of a minor engaged in sexually explicit conduct. 18 U.S.C. § 2252(a)(2). He contends that the district court should have granted his motion to suppress evidence, including his statements, because the anticipatory search warrant that authorized the search of his premises was invalid under the Fourth Amendment. To resolve Grubbs' claim, we must determine whether a facially

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* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation

defective anticipatory search warrant may be cured by information contained within an affidavit when that affidavit is not presented to the person or persons whose property is to be searched. We answer that question in the negative, and hold that the search of Grubbs' premises violated the Fourth Amendment.[1]

I. FACTUAL AND PROCEDURAL HISTORY

On April 17, 2002, United States Postal Inspector Gary Welsh ("Welsh") presented an "Application and Affidavit for Anticipatory Search Warrant" to a federal magistrate judge. The application sought authority to conduct a search of Grubbs' residence on the basis of an order Grubbs allegedly placed for a videotape entitled "Lolita Mother and Daughter." Grubbs allegedly ordered the videotape from a website that advertised for sale numerous videos depicting illegal child pornography. Welsh averred that Grubbs sent him a letter which contained $45 in cash and a note stating: "I hope this makes it to you please send film asap thanks Jeff Grubbs." On the basis of this evidence, the magistrate judge issued an anticipatory search warrant. The face of the warrant stated:

> Affidavit(s) having been made before me by _____ who has reason to believe that on the premises known as residence of Jeffrey Grubbs, [Address] as more particularly described in Attachment A to the attached Affidavit, in the Eastern District of Cali-

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[1] Grubbs also claims that the statement he gave to officers at the beginning of the search was obtained in violation of *Miranda*, and that the officers violated Fed. R. Crim. P. 41(d) by failing to show him the warrant at the outset of the search. Our resolution of the principal question in this case makes it unnecessary to resolve these other issues.

> fornia there is now concealed a certain person or property, namely the records and materials described in Attachment B to the attached Affidavit. I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

As revealed by the "now concealed" language, the inartfully drafted warrant approved by the magistrate was written on a form "forthwith" search warrant.[2] The only indication that the warrant was an anticipatory search warrant was the word "ANTICIPATORY," handwritten at the top of the page above the words "SEARCH WARRANT." The warrant itself did not state what triggering conditions needed to occur in order to make the warrant valid; nor did it state the criminal activity of which Grubbs was suspected.

The warrant relied on a 25-page affidavit to satisfy the specificity and particularity requirements of the Fourth Amendment. According to the affidavit, the warrant would become operative once the videotape Grubbs ordered was "received by a person(s)" and "taken into the residence." Pages five and nineteen of the affidavit set forth these "triggering events," or conditions precedent, upon which a search would become authorized. The affidavit also had two attachments: Attachment A described the premises to be searched; Attachment B listed the items to be seized, including

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[2] It is clear that, at the time the warrant was approved, no records or materials were "now concealed" at Grubbs' residence.

the videotape and packing material, Grubbs' Web TV components, and various other items.

The search took place two days later. At approximately 7:20 A.M., an undercover postal inspector delivered the videotape to Grubbs' residence. Grubbs' wife accepted the delivery of the package, signed for it, and took it into the house. A few minutes later, Postal Inspector Thomas Brucklacher saw Grubbs leaving. At approximately 7:24 A.M., Brucklacher and Inspector Esteban approached Grubbs and, after identifying themselves, told him to remain where he was standing. Grubbs asked Brucklacher why he and the other inspectors were there. Brucklacher did not answer, but instead referred him to Inspector Welsh, who was then approaching the residence. Meanwhile, Inspector Esteban performed a patdown search of Grubbs.

Shortly after Grubbs was detained outside of the house, Inspector Welsh arrived at the premises with a number of other law enforcement personnel. In all, there were ultimately ten officers and inspectors at the scene. Welsh allegedly announced "Police/Search Warrant" at the front door. Grubbs' wife, Ms. Bradstreet, disputed hearing that announcement, but did testify that she heard a knock and answered the door. Welsh briefly entered the house to help several other officers perform a "protective sweep." During that "protective sweep," the officers searched the house for other people and stopped to prepare sketches of the interior. They permitted Grubbs' children to leave for school after searching their backpacks. After assisting the officers inside, Welsh went back outside to speak with Grubbs, who was on the sidewalk with other officers. Welsh identified himself, and stated either "You know why

we're here" or "Do you know why we're here?"[3] Grubbs replied "yeah," and said that what the officers were looking for was in the garage. Welsh told Grubbs that he was not under arrest, but that they were there to serve a search warrant, and that they should go inside the house to talk.[4]

Grubbs and Welsh, accompanied by Officer Esteban, entered the house together and sat down at the dining room table. It was not until 7:53 A.M., approximately 30 minutes after the search began, that Welsh presented Grubbs with the search warrant.[5] The copy of

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[3] The record does not establish with certainty whether Welsh asked this as a question or stated it as a matter of fact. Welsh testified that he phrased the words as a statement because "I didn't want to ask any questions prior to *Miranda*." The district court found that it was phrased in the form of a statement, rather than a question. Ultimately, we find it inconsequential whether Welsh spoke the words in the form of a question or a statement, as we decline to reach the *Miranda* issue.

[4] The district court did not make an explicit factual finding as to the sequence of events as described in this paragraph. However, to the extent that the district court's decision suggests that the "protective sweep" did not begin until after Welsh had spoken with Grubbs, it is clearly erroneous. Welsh's declaration itself admits that he announced "police/search warrant" at the front door, entered the house with the search team to begin a protective sweep, and only then returned outside to speak with Grubbs.

[5] At the evidentiary hearing in the district court, Welsh explained this 30 minute delay as follows:

> Well, we had to get in, we talked to his wife, explained to his wife why we were there. I made sure the kids got off to school on time. We checked their backpacks, of course, as per procedures and to make sure nothing was leaving the house. We took care of that. We went in, photographs were taken of the house, sketches, hand drawn sketches of the house had to be made. It took a while to clear things away from the table.

the search warrant provided to Grubbs included the two attachments, which described the place to be searched and the items to be seized, but did not include the affidavit that contained the "triggering events" or conditions precedent that would serve to make the warrant operative. Welsh contended that he had a copy of the affidavit with him at all times during the search, and that his team had all read the affidavit on the previous evening. However, the government concedes that the affidavit was not presented to Mr. Grubbs or Ms. Bradstreet, and that no copy of the affidavit was left at the residence following the search.

After the warrant was presented, Welsh reminded Grubbs that he was not under arrest, advised him of his *Miranda* rights, and asked if he understood those rights. Grubbs said that he did and agreed to speak to Welsh. The interview lasted approximately 55 minutes. In it, Grubbs admitted that he had ordered the pornography. He further admitted that he possessed child pornography in various digital forms in his home. At the conclusion of the interview, Grubbs was arrested and handcuffed. The officers seized the videotape in question along with several other items, including Grubbs' computer and several computer diskettes.[6]

Within a few days, a grand jury returned an indictment charging Grubbs with receiving a visual depiction of a minor engaged in sexually explicit conduct. 18

> We also had to deal with the fact that narcotics paraphernalia were found on the defendant plus on the table that we were about to do the interview on. So all told, I think all those preliminaries took about 30 minutes.

[6] The actual list of evidence seized is unimportant in this case, as the government has stipulated that the only physical evidence it intended to introduce at trial was the videotape.

U.S.C. § 2252(a)(2).[7] Grubbs filed a motion to suppress evidence, in which he challenged the admissibility of all of the seized evidence and his statements to Welsh. Grubbs made three principal claims: (1) that the agents' failure to present the affidavit to Grubbs or his wife rendered the warrant inoperative; (2) that the agents violated Fed. R. Crim. P. 41(d) by failing to present the search warrant at the outset of the search; and (3) that his statement that the video was in the garage should be excluded as the product of an impermissible custodial interrogation. The first and third claims alleged constitutional violations.

Following an evidentiary hearing, the district court denied the motion to suppress in a written order. With respect to Grubbs' first claim, the Fourth Amendment claim, the district court held that the anticipatory warrant could constitutionally be executed even though it failed to designate the triggering event for the implementation of the anticipatory search. It did so on the basis that the warrant incorporated the affidavit by reference, and that the affidavit was in the immediate presence of the officers while they searched Grubbs' residence. The court did not consider the officers' failure to present the affidavit to the residents of the home to be searched as constituting a constitutional defect. The district judge admitted that "it is logical that officers would be required to actually present the

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[7] That section makes illegal the knowing receipt or distribution of "any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or . . . any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer." *Id.*

affidavit setting forth the triggering event to the people whose property they are searching in order to provide those people with information regarding the parameters of the search." However, after concluding that no case from our circuit had ruled on the precise question, the court declined to apply that logic "in the absence of specific guidance from the Ninth Circuit."[8] Thus, it upheld the search, even though none of the persons whose residence was searched were shown the affidavit that identified the triggering event.

After filing a motion for reconsideration, which the district court denied, Grubbs entered a conditional guilty plea to the sole charge of the indictment—receiving a visual depiction of a minor engaged in sexually explicit conduct. He reserved his right to appeal the denial of his motion to suppress. The district court sentenced him to thirty-three months imprisonment, a three-year term of supervised release, a fine of $3,700, and a $100 special assessment. Grubbs timely appealed.

II. DISCUSSION

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The requirement that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized" is most often described as the "particularity requirement." As the Supreme Court has recently explained, that requirement "applies with equal force to searches whose only defect is a lack of particularity in the warrant." *Groh v.*

[8] For reasons we need not discuss here, the district court denied Grubbs' Rule 41(d) and *Miranda* claims as well.

Ramirez, 540 U.S. 551, ——, 124 S. Ct. 1284, 1291, 157 L. Ed. 2d 1068 (2004).

The *Groh* Court considered a warrant that "failed to identify any of the items" to be seized. 540 U.S. at ——, 124 S. Ct. at 1288. Despite the fact that the officers conducting the search had presented to the reviewing magistrate a detailed affidavit setting forth sufficient probable cause for the search, the warrant itself did not explicitly "incorporate by reference the itemized list [of things to be seized] contained in the application." *Id.* The officers in *Groh* left the residents of the searched home a copy of the search warrant, "but not a copy of the application, which had been sealed." *Id.* at 1289. The Court found that the officers' conduct directly conflicted with the purpose of the Fourth Amendment's particularity requirement:

> The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. And for good reason: "The presence of a search warrant serves a high function," and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection. . . .
>
> . . . .
>
> We have long held, moreover, that the purpose of the particularity requirement is not limited to the prevention of general searches. A particular warrant also "assures the individual whose property is searched or seized of the lawful authority of the

> executing officer, his need to search, and the limits of his power to search."

Groh, 540 U.S. at —— - ——, ——, 124 S. Ct. at 1289-90, 1292 (citations omitted).

Our cases have long been in accord with the Supreme Court's reasoning in *Groh*. We have held that a search warrant is invalid when it does not contain a specific description of the types of items to be seized. *See, e.g.*, *United States v. Spilotro*, 800 F.2d 959, 963-64 (9th Cir. 1986). And, while we have permitted facially defective warrants to be "cured" by an affidavit that (a) is incorporated within the four corners of the warrant and (b) "accompanies" the warrant, *see United States v. Van Damme*, 48 F.3d 461, 466 (9th Cir. 1995), we have unequivocally held that the defect is not cured if the officers fail to present the affidavit—that is, an affidavit that is not shown to the persons being subjected to the search does not have a curative effect on a facially defective warrant. *See United States v. McGrew*, 122 F.3d 847, 849-50 (9th Cir. 1997).

As we explained in *McGrew*, we require affidavits to accompany warrants not only in order to limit officers' discretion in conducting the search, but also in order to "*inform the person subject to the search what items the officers executing the warrant can seize*." *Id.* at 850 (quoting *United States v. Hayes*, 794 F.2d 1348, 1355 (9th Cir. 1986)) (emphasis in *McGrew*). If the officers conducting the search were not required to present the affidavit to the residents of the house being searched, law enforcement personnel would be free to search as they like, and homeowners and others would have no effective way to ensure that the search of their premises conformed to the lawful constraints approved by an impartial magistrate. *See id.* at 850; *see also Rami-*

rez v. Butte-Silver Bow Cty., 298 F.3d 1022, 1026 (9th Cir. 2002) ("When officers fail to attach the affidavit to a general warrant, the search is rendered illegal because the warrant neither limits their discretion nor gives the homeowner the required information."), *aff'd Groh*, 540 U.S. at ——, 124 S. Ct. at 1295; *Ramirez*, 298 F.3d at 1027 ("To stand a real chance of policing the officers' conduct, individuals must be able to read and point to the language of a proper warrant.").

Our cases have similarly held, without exception, that the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant. An anticipatory search warrant is not valid until the occurrence of one or more "triggering events"—in other words, the predicted future events that the magistrate determines will create sufficient probable cause to justify the search. And, "when a warrant's execution is dependent on the occurrence of one or more conditions, the warrant itself must state the conditions precedent to its execution and these conditions must be clear, explicit, and narrow." *United States v. Hotal*, 143 F.3d 1223, 1226 (9th Cir. 1998). The rationale for this rule is simple: "a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings: inevitably, the executing agents are called upon to determine when and where the triggering event specified in the warrant has actually occurred." *Id.* at 1226 (quoting *United States v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993)). Application of the particularity requirement is "the only way effectively to safeguard against unreasonable and unbounded searches." *Id.* at 1227.

We have, however, permitted the triggering conditions of an anticipatory search warrant to appear either on the face of the warrant itself, or in the "attachments[to the warrant] that those executing the search maintain in their immediate possession in order to guide their actions and *to provide information to the person whose property is being searched.*" *Id.* (emphasis added); *see also United States v. Vesikuru*, 314 F.3d 1116, 1120 (9th Cir. 2002) ("It is important to emphasize that we have not held that the condition precedent must be stated within the four corners of the warrant itself."). Still, while an affidavit may qualify as a valid curing "attachment" to an otherwise defective warrant, it counts as such only when the affidavit actually "accompanies" the warrant. As we explained in *Hotal*,

> The first requirement, that the application but *not* the warrant itself identify the triggering event, does little if anything to limit the discretion of the agents executing the warrant or *to inform the subject of the search whether it was authorized*, if the affidavit does not accompany the warrant. Indeed, that the applicant and the magistrate may understand the parameters of the search has no bearing on whether the officers executing the warrant do, or *whether the person to be searched is properly advised of their authority.*

Hotal, 143 F.3d at 1227 (emphasis added).

The question in this case is whether a curative affidavit that contains the conditions precedent to an anticipatory search actually "accompanies" the warrant when the affidavit is not shown to the person or persons being subjected to the search. Given our prior holdings, and the Court's most recent decision in *Groh*, the dis-

trict court was correct when it opined that "it is logical that officers would be required to actually present the affidavit setting forth the triggering event to the people whose property they are searching in order to provide those people with information regarding the parameters of the search." Likewise, the district court was right to conclude that the "underlying reasoning" of *Hotal* supports the rule that "the affidavit setting forth the triggering event for an anticipatory warrant must be presented to the people whose property is being searched." The district court, however, was unwilling to impose such a requirement in this case without further explicit guidance from us.

We believe that our prior cases unambiguously require officers to present any curative document—be it an affidavit, attachment, or other instrument that supplies the particularity and specificity demanded by the Fourth Amendment—to the persons whose property is to be subjected to the search. To the extent that there is any question that our cases have adopted that rule, we do so explicitly now. Anticipatory search warrants are invalid absent "clear, explicit, and narrow" triggering conditions. *See Hotal*, 143 F.3d at 1226. Those triggering conditions may be listed either in the warrant itself or in attached documents, but whatever document contains them must be presented to the person whose property is being searched. Absent such presentation, individuals would "stand [no] real chance of policing the officers' conduct," because they would have no opportunity to check whether the triggering events by which the impartial magistrate has limited the officers' discretion have actually occurred. *See Ramirez*, 298 F.3d at 1027. In short, unless the officers "present" the document containing the triggering

events necessary to render an anticipatory search warrant operative, the search warrant is constitutionally invalid. In the absence of a proper presentation, "the search is rendered illegal because the warrant neither limits [the officers'] discretion nor gives the homeowner the required information." *Id.* at 1026.

In this case, there is no dispute that the officers failed to present the affidavit—the only document in which the triggering conditions were listed—to Grubbs or Bradstreet. At no point before, during, or after the search did the officers show or read the affidavit to either of them. The copy of the warrant left with Ms. Bradstreet at the conclusion of the search did not include the affidavit, nor did it otherwise include a list of the triggering conditions. The warrant was therefore inoperative, and the search was illegal.[9]

Absent a constitutionally valid warrant, the officers lacked the legal authority to enter the defendant's home. The fact that the search ultimately may have been conducted in a manner consistent with the application for the warrant is irrelevant. "If a warrant fails for lack of particularity or specificity, it is simply unconstitutional—without regard to what actually occurred." *Hotal*, 143 F.3d at 1227. Nor is it significant that the officers may have possessed curative documents during the search, unless those documents were presented to the owners or occupants of the property: "that the

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[9] We need not decide whether the warrant and curative material must be shown to the persons whose property is being searched *prior* to the officers' entry into the home. We do note, however, that "absent exigent circumstances, if a person is present at the search of her premises, Rule 41(d) requires officers to give her a complete copy of the warrant at the outset of the search." *United States v. Gantt*, 194 F.3d 987, 994 (9th Cir. 1999).

applicant and the magistrate may understand the parameters of the search has no bearing on whether . . . the person to be searched is properly advised of [the officers'] authority." *Id.* at 1227. We therefore conclude that the officers in this case did not execute a constitutionally valid warrant, and that they, in effect, conducted a warrantless search. *See id.* at 1228 & n.7. As a result, *all* evidence obtained during that search, and following Welsh's announcement of "Police/Search Warrant," must be suppressed. *See id.* at 1228 ("Because we conclude that the initial entry was impermissible and that the evidence seized pursuant to the warrant must be suppressed, *all* of the other evidence seized must also be suppressed. Consent to search that is given after an illegal entry is tainted and invalid under the Fourth Amendment."). "All evidence" includes all of the evidence seized after the initial entry, as well as all of Grubbs' statements, all of which were taken either during the illegal entry or as a direct causal result of it. *See United States v. Crawford*, 372 F.3d 1048, at 1053-54, 2004 WL 1375521, at * 4 (9th Cir. June 21, 2004) (en banc) (holding that the Fourth Amendment's exclusionary rule "applies to statements and evidence obtained as a product of illegal searches and seizures" whenever there is a "causal connection between the illegal conduct and the evidence sought to be suppressed"); *see also Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) ("Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion.").[10]

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[10] It might be argued that because the officers had probable

cause to perform the search and arrest Grubbs in the first instance, the statements Grubbs made to the officers were admissible. *See United States v. Ladum*, 141 F.3d 1328, 1337 (9th Cir. 1998) (en banc). This argument fails for three reasons. First, the government did not make this argument, either in its briefs or at oral argument, despite the fact that Grubbs had argued from the start that suppression of all evidence and statements would be required in the event that we found a Fourth Amendment violation. The argument is therefore waived. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

Second, statements that are taken from a homeowner in the course of an illegal search of his home must be suppressed. *See New York v. Harris*, 495 U.S. 14, 20-21, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990). All of Grubbs' statements were made during the course of the unconstitutional search. Inspector Welsh's declaration establishes that he announced "Police/Search Warrant" at the door prior to the time the officers entered to conduct their "protective sweep" and prior to the time Grubbs made his statement regarding the location of the video. *See supra* note 4. No evidence had been obtained or noticed in plain view at that point. Under *Hotal*, all evidence seized after Welsh's "search warrant" announcement at the door must be suppressed, 143 F.3d at 1228, and, under *Harris*, this includes all statements made during the course of the search, 495 U.S. at 20-21, 110 S. Ct. 1640.

Third, application of the exclusionary rule depends on the facts of each case. *Brown v. Illinois*, 422 U.S. 590, 603, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). In this case, the fruits (Grubbs' statements) are "directly or indirectly attributable to the constitutional violation," *Crawford*, 372 F.3d 1048, 2004 WL 1375521, at *8, and thus the pertinent causal connection exists. The illegality was the officers' failure to present to Grubbs information that would have informed him about the reasons for the search such that he could have challenged the entry if he so desired. *See Ramirez*, 298 F.3d at 1026-27, *aff'd Groh*, 540 U.S. at ——, 124 S. Ct. at 1295. Inspector Welsh's declaration "You know why we're here" presumed that Grubbs knew the very information that the affidavit was supposed to provide. Were we to validate this type of investigative technique, we would be encouraging officers to evade the particularity requirement of the Fourth Amendment by obtaining poten-

III. CONCLUSION

The failure to present the affidavit designating the triggering events or conditions precedent to the operability of the search warrant rendered the warrant constitutionally invalid and the search illegal. Because Grubbs entered a conditional guilty plea, we are required to remand and allow him to withdraw his plea if he elects to do so. *See United States v. Mejia*, 69 F.3d 309, 316 n.8 (9th Cir. 1995). We therefore reverse the denial of Grubbs' suppression motion and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

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tially incriminating statements of understanding from search subjects. Therefore, not only is the "challenged evidence [ ] in some sense the product of illegal governmental activity," *see Ladum*, 141 F.3d at 1337 (quoting *Harris*, 495 U.S. at 19, 110 S. Ct. 1640), but application of the exclusionary rule "serve[s] the purpose of the rule that made [the search] illegal." *Harris*, 495 U.S. at 20, 110 S. Ct. 1640.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CR. S-02-164 WBS

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

Filed: Feb. 14, 2003

MEMORANDUM AND ORDER RE: MOTION FOR RECONSIDERATION

This matter came on for hearing on the motion of defendant Jeffrey Grubbs to suppress evidence obtained as the result of a search of his residence on April 19, 2002 and to suppress statements made by defendant to officers on April 19, 2002. The court herd testimony, received and considered documentary evidence, and heard the arguments of counsel. The court denied defendant's motion to suppress. (Jan. 16, 2003 Order).[1] Defendant now moves for reconsideration on the grounds that the court made errors of law in denying his motion to suppress.

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[1] The court will not recite the facts of this case here. The court's findings of fact are available in its January 16, 2003 Order.

I. *Legal Standard*

Pursuant to Local Criminal Rule 12-430, whenever a motion for reconsideration of a decision on a prior motion is made, it is counsel's duty to present to the judge "what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion or what other grounds exist for the motion." E.D. Cal. Local Rule 12-430(3).

II. *Anticipatory Search Warrant*

A. *Validity of Warrant*

According to defendant, the Ninth Circuit's recent decision in *United States v. Vesikuru*, 314 F.3d 1116 (9th Cir. 2002), requires this court to reconsider its holding that the warrant in this case was valid. In *Vesikuru*, the Ninth Circuit reiterated a well-settled principle on which this court based its holding in denying defendant's motion to suppress—namely that in the anticipatory warrant context, "[t]he Fourth Amendment's particularity requirement is satisfied if (1) an affidavit setting forth the triggering event for the search accompanies the warrant at the time of the search, and (2) the warrant sufficiently incorporates that accompanying affidavit." *Vesikuru*, 314 F.3d at 1120. The court then relied on these requirements to hold that the warrant was facially valid because it incorporated the supporting affidavit and because the affidavit accompanied the warrant at the search. *Id.* at 1121-22.

Defendant reads *Vesikuru* as requiring the affidavit to contain the triggering event on its face and therefore argues that the warrant in this case was invalid because the "triggering event is buried deep within the warrant affidavit and not clearly and expressly set forth on its

face."[2] In a string cite, the *Vesikuru* court did refer to language from *United States v. Hotal*, 143 F.3d 1223 (9th Cir. 1998), stating that the triggering event for an anticipatory search warrant must appear on the face of the warrant or on the face of the accompanying affidavit. *See Vesikuru*, 314 F.3d at 1120. However, the Ninth Circuit's discussion in *Vesikuru* focused on what constitutes sufficient words of incorporation, and not, as defendant erroneously contends, on the language from *Hotal* stating that the triggering event must be on the face of the affidavit. *See id.* at 1120-21.

Neither *Vesikuru* nor *Hotal* provide any further guidance as to what it means for the triggering event to be "on the face" of the affidavit. The *Vesikuru* court found the affidavit to be sufficient based on the principles discussed above and did not indicate which specific portion of the affidavit set forth the triggering event. *Id.* at 1118, 1120-22. The *Hotal* court found the warrant to be invalid because it did not mention the triggering event on its face and because there was no evidence that the affidavit accompanied the warrant at the time of the search. *Hotal*, 143 F.3d at 1225, 1227.

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[2] Defendant argues that the triggering event does not appear in the affidavit until paragraphs 57 through 61. However, the triggering event—the controlled delivery of the video tape—is first set forth at paragraph fourteen of the affidavit. It is discussed in the context of Inspector Welsh's statements regarding his training and the reason for the affidavit. Therefore, contrary to defendant's assertion, it does not appear to be "buried deep" within the affidavit. In defendant's briefs on his motion to suppress, he did not raise the issue of the placement of the triggering event in the affidavit but focused his arguments on whether the affidavit was present at the search.

In its previous order, this court relied on the same legal principles as the *Vesikuru* court and found that the requirements for anticipatory warrants were satisfied in this case. Specifically, this court held that the requirements for anticipatory search warrants set out by the Ninth Circuit in *Hotal* and *Ramirez v. Butte-Silver Bow County*, 298 F.3d. 1022 (9th Cir. 2002), had been complied with because the triggering event was contained in the affidavit,[3] the affidavit was incorporated into the warrant by reference, and the affidavit was in the immediate possession of the officers at the time of the search. *See* Jan. 16, 2003 Order at 9-10. Accordingly, this court will not change its decision regarding the validity of the warrant in light of *Vesikuru*.

B. *Presentment of Affidavit*

Defendant next contends that this court erred in holding that the law in the Ninth Circuit has not yet reached the point that presentment of the affidavit specifying the triggering event along with the warrant to the people whose property is being searched is required. According to defendant, the Ninth Circuit's decision in *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997) dictates the opposite result.[4]

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[3] In his reply, defendant contends that the reference to the affidavit contained in the search warrant is "confusing and not clear." However, "there are no required magic words of incorporation." *Vesikuru*, 314 F.3d at 1121. Rather, "'suitable words of incorporation'" are all that is required. *Id.* (quoting *Ramirez*, 298 F.3d at 1026) (emphasis in *Vesikuru*). This court found that the search warrant in this case properly incorporated the affidavit by reference because it referred to the "attached affidavit." Defendant has not presented any new facts to refute this finding.

[4] Defendant contends that the court erred in not discussing *McGrew* in its order denying his motion to suppress. However, the

McGrew does not deal with an anticipatory search warrant in which the triggering event is contained in the affidavit. Rather, the affidavit incorporated into the warrant in *McGrew* contained a description of items that, could be seized. *See id.* at 849-50, 849 n.3. There was no evidence that the affidavit was present at the time of the search, and the government did not serve a copy of the affidavit on McGrew. *Id.* at 849. The *McGrew* court held that the warrant was invalid because the government did not serve McGrew with a warrant that, "either on its face or by attachment," contained "a sufficiently particular description of what is to be seized." *Id.* at 850.

In this case, the government presented evidence, and the court found, that the copy of the search warrant placed on the table by Inspector Welsh during his interview with defendant on the day of the search included Attachment A, a description of the property to be searched, and Attachment B, a list of items to be seized. (Welsh. Supp. Decl.). Defendant's wife also testified that the copy of the warrant she was given included "attachments as far as what they took, the inventory." (Hr'g Tr. Oct. 15, 2002 at 73:7-11). Therefore, *McGrew*'s holding as to proper presentment of the description of items to be seized was complied with in this case.

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parties' positions on the import of the *McGrew* decision were fully briefed and argued before this court, and considered by this court, on defendant's motion to suppress. The court is not required to specifically discuss each case cited by each party. Indeed, such a requirement would be impracticable. The court properly relied on other Ninth Circuit cases relevant to this issue, which were also presented to the court by the parties. *See* Jan. 16, 2003 Order at 10-11.

Defendant argues that *McGrew*'s holding should be applied to require affidavits containing triggering events to be presented to defendants. However, the *McGrew* court specifically contemplated circumstances in which affidavits would not be presented along with search warrants. *See id.* at 850 ("If the government wishes to keep an affidavit under seal, it must list the items it seeks with particularity in the warrant itself.").

In addition, although the Ninth Circuit has noted that one of the purposes of requiring the triggering event for an anticipatory search warrant to be on the face of the warrant or the accompanying affidavit is "to provide information to the person whose property is being searched," *Hotal*, 143 F.3d at 1227, the Ninth Circuit has not reached the presentment issue in these cases. Defendant's arguments do not persuade the court to change its decision that the search warrant in this case was valid. As this count previously noted, while the logic underlying existing Ninth Circuit case law on anticipatory search warrants may arguably be extended to support defendant's position, the Ninth Circuit has yet to hold that presentment of an affidavit such as the one in this case is required.[5] *See* Jan. 16, 2003 Order at 10-11.

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[5] Defendant further contends that the Ninth Circuit's decisions in *United States v. Hightower*, Nos. 00-50065, 00-50355, 2002 WL 1560785 (9th Cir. July 15, 2002) and *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989), require presentment of the affidavit. First, *Hightower* is an unpublished decision which may not be cited. Second, although it is true that, in both of these cases, affidavits were not given to the defendants, neither of these cases involved an anticipatory search warrant or require presentment in the circumstances of this case. Moreover, unlike the warrant in this case, the warrants in those cases did not incorporate by reference the affidavits necessary to satisfy the particu-

III. *Rule 41(d) Violation*

Finally, defendant contends that this court erred in holding that the Rule 41(d) violation in this case was technical, rather than fundamental, and that suppression of evidence is therefore required. Fundamental violations of Rule 41 (d) are "ones which are unconstitutional under traditional Fourth Amendment standards" and "require automatic suppression of the evidence produced." *United States v. Johns*, 948 F.2d 599, 604 (9th Cir. 1991).

Defendant characterizes the facts in this case as being that "no actual warrant [was] served to a resident."[6] Defendant contends that he was never served with a warrant because "he never received a complete packet."[7] However, as discussed both in this Order and

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larity requirement. *See Center Art Galleries*, 875 F.2d at 749 (holding that overbroad search warrants were not cured by more particular affidavits because the affidavits were not incorporated into the warrant by reference).

[6] Defendant relies on *United States v. Choi*, Nos. 98-10080, 98-10101, 98-10122, 1999 WL 386660 (9th Cir. May 21, 1999), a case cited by this court in a footnote in its January 16, 2003 Order, for the proposition that "serving the face sheets of a warrant without the affidavits or excerpted lists is not even service of the search warrant." The court recognizes that it erred in citing *Choi*, an unpublished opinion, in its previous order. *See* 9th Cir. Rule 36-3. The reference to Choi should not have been made and was not necessary to the reasoning or result of this court's prior order. Accordingly, the court takes this opportunity to strike the language in footnote 6 of the court's January 16, 2003 order regarding *Choi*, and the court will not address *Choi* here.

[7] Defendant quotes *United States v. Towne*, 997 F.2d 537 (9th Cir. 1993) as stating that "[a]ll documents that agents rely upon to satisfy Fourth Amendment requirements constitute the 'search warrant.'" First, *Towne* does not even discuss Rule 41(d). Second, defendant misattributes a sentence from *Choi* (after which the

the court's January 16, 2003, Order, Inspector Welsh placed a copy of the warrant along with Attachments A and B on the table during his interview with defendant. In addition, copy of the warrant along with a list of items seized was left with defendant's wife. *See* Section II (B), *supra*; Jan. 16, 2003 Order at 4, 15.

Defendant has not previously argued that the Rule 41(d) violation in this case was fundamental. Rather, defendant relied on *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999), a case dealing with non-fundamental Rule 41(d) violations, in contending that Rule 41 (d) was violated in this case because defendant was not presented with a warrant at the outset of the search and that this violation required suppression because it was deliberate. This court agreed with defendant that a Rule 41(d) violation occurred in this case, but held that the violation was technical and that suppression was

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court cited to *Towne*) as a quotation from *Towne* itself. As noted in the previous footnote, *Choi* is an unpublished opinion that cannot be cited. Moreover, in *Towne*, the Ninth Circuit stated that "'[t]he documents that are in fact relied upon to serve these varied functions simply are 'the search warrant' for purposes of constitutional analysis." *Id.* at 548 (emphasis in original). The functions the Ninth Circuit referred to were limiting the discretion of officers executing a warrant, giving the person being searched notice of the specific items that may be seized, and guaranteeing that the magistrate issuing the warrant is aware of the scope of the search. *Id.*

In the present case, defendant and his wife were given notice of the items that could be seized. Moreover, in *McGrew*, as discussed at Section II(B), supra, the Ninth Circuit contemplated that a warrant could be valid even if an affidavit was not presented to a defendant. Therefore, defendant's apparent argument that *Towne* somehow stands for a Ninth Circuit rule requiring all documents related to a warrant to be served on defendant in order to satisfy Rule 41(d) is meritless.

not required.[8] *See* Jan. 16, 2003 Order at 11-16. In the absence of any new facts or circumstances, new law on this issue, or argument that this court misapplied Ninth Circuit precedent on this issue, defendant's mere disagreement with the court's holding does not mandate reconsideration.

IT IS THEREFORE ORDERED that defendant's motion for reconsideration be, and the same hereby is, DENIED.[9]

DATED: February 13, 2003

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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[8] Moreover, this court held that the search warrant in this case was supported by probable cause as to the video tape, that defendant's other arguments regarding lack of probable cause were moot because the government has stated that it will not offer evidence other than the video tape at trial, and that the warrant was a valid anticipatory search warrant. *See* Jan. 16, 2003 Order at 4-9. Therefore, the requirements of the Fourth Amendment have been complied with in this case.

[9] Defendant filed another brief on these issues after the hearing on his motion for reconsideration. No further briefs on this matter will be considered by this court.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CR. S-02-164 WBS

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

Filed: Jan. 16, 2003

MEMORANDUM AND ORDER

This matter came on for hearing on the motion of defendant Jeffrey Grubbs to suppress evidence obtained as the result of a search of his residence on April 19, 2002 and to suppress statements made by defendant to officers on April 19, 2002. The court heard testimony, received and considered documentary evidence, and heard the arguments of counsel. The following constitutes the court's findings of fact and conclusions of law.

I. *Factual and Procedural Background*

On December 20, 2001, defendant responded to an undercover advertisement that had been placed on tow internet newsgroups entitled, "alt.binaries.pictures.erotic.children" and "alt.sex.pedophile" by a United

States Postal Inspector. (SW Aff. ¶¶ 21, 23). The undercover web page operated by the Postal Service describes a collection of videotapes depicting minors engaged in sexually explicit conduct. (*Id.* ¶ 29). On December 27, 2001, an undercover postal inspector received an order from defendant for a videotape entitled "Lolita Mother and Daughter." (*Id.* ¶ 30). On February 5, 2002 the postal inspector received a letter from defendant which gave his address as "1199 Park Tarrace [sic] Dr., Galt, CA 95632.'" (*Id.* ¶ 42). The envelope also contained $45.00 in U.S. Currency. (*Id.*)

On April 17, 2002, based on this transaction, United States Postal Inspector Gary R. Welsh presented an "Application and Affidavit for Anticipatory Search Warrant" to Magistrate Judge John F. Moulds. The affidavit requests an anticipatory search warrant to search defendant's residence if he "or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632." (*Id.* ¶¶ 14; 61) .

In the affidavit, Inspector Welsh identified himself as the Child Sexual Exploitation Specialist for the Northern California Division and detailed his experience and training in the area of child pornography and child sexual exploitation. (*Id.* ¶¶ 1-12). Inspector Welsh also described the videotape requested by defendant as containing child pornography as defined in 18 U.S.C. § 2256(2). (*Id.* ¶ 56). Inspector Welsh stated that the tape "depicts a nude, juvenile female, approximately 10 to 13 years of age, engaged in sexually explicit conduct with a nude adult female appearing to be approximately 20 to 30 years of age." (*Id.*). Magistrate Judge Moulds signed the search warrant on April 17, 2002. The word

"anticipatory" was handwritten on the face of the warrant.

On April 19, 2002, at approximately 7:20 A.M., an undercover postal inspector delivered a package containing the videotape to defendant's residence. The package was signed for and taken into the residence by Carol Bradstreet, defendant's wife. (Welsh Decl. ¶ 2). At approximately 7:25 A.M., Inspector Welsh, together with six other postal inspectors and three uniformed patrol officers from the Galt Police Department, executed the search warrant at defendant's residence. (*Id.* ¶ 1). The officers were armed during the search but did not have their guns drawn. (Tr. Esteban Test. at 16:18-17:11, 29:15-17; Tr. Bradstreet Test. at 75:10-16).

At approximately 7:24 A.M., an inspector observed defendant leaving the residence. He approached defendant, identified himself as a police officer, and told defendant to remain where he was standing. (Welsh Decl. ¶ 4). Inspector Welsh then approached defendant outside his residence and, said, "'You know why we're here.'" (Tr. Welsh Test. at 45:20-46:3). Defendant responded that he knew why the officers were there and that the package was in the garage. (*Id.* at 46:10-14; Tr. Esteban Test. at 20:17-21:4). Defendant was assured that he was not under arrest at that time. *(Id.* at 46:15-17).

Approximately thirty minutes elapsed between the time the officers approached the house and the time that Inspector Welsh, Inspector Esteban, and defendant entered the house and sat down to talk. (*Id.* at 47:6-13). During this time, some of the officers conducted a protective sweep of the residence. (Tr. Esteban Test. at 23:5-19; Welsh Decl. ¶ 11). Some of the officers also checked defendant's children's backpacks

before they went to school, took photographs of the house, and made sketches of the house. (Tr. Welsh Test. at 47:6-48:1).

At approximately 7:53 A.M., defendant was advised of his Miranda rights. (Welsh Decl. ¶ 15; Tr. Welsh Test. at 48:14-11). Inspector Welsh put a copy of the search warrant on the table around which he, Inspector Esteban, and defendant were seated. (Tr. Welsh Test. at 48:20-49:2). The search warrant affidavit was in the possession of the officers at the search. (*Id.* at 52:8-10). However, the affidavit was not presented to defendant or his wife or left at defendant's residence. (Hr'g Tr. Oct. 23, 2002 at 3:21-4:12).

During the interview, defendant signed a consent form allowing the officers to remove and search his computer, CD-roms, and floppy diskettes. (Welsh. Decl. ¶18). After the interview, which lasted for approximately one hour, defendant was arrested for violating the child pornography laws. (*Id.* at 51:2-14). The indictment in this case charges defendant with receiving a visual depiction of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). (April 25, 2002 Indictment).

II. *Discussion*

A. *Probable Cause for Search*

First, defendant moves to suppress the evidence seized during the search of his residence on April 19, 2002 on the ground that probable cause did not exist to support the issuance of the warrant. The issuance of a search warrant is reviewed for clear error. *See United States v. Fullbright*, 105 F.3d 443, 453 (9th Cir. 1997) ("The magistrate making the original determination of probable cause is accorded significant deference by the

reviewing court."). In determining whether to issue a search warrant a magistrate must simply "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Hay*, 231. F.3d 630, 634 n.4 (9th Cir. 2000) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). This court must therefore determine "whether there was a '*substantial basis*' for concluding that the warrant was supported by probable cause." *Fullbright*, 105 F.3d at 453. (emphasis added).

1. *The Video Tape*

Defendant contends that the magistrate judge did not have a substantial basis to issue a warrant because he did not have probable cause to believe that the video tape ordered by and delivered to defendant contained illegal child pornography. Specifically, defendant contends that Inspector Welsh's statements in the search warrant affidavit regarding his training in the field of child pornography do not establish: 1) that he is qualified to estimate the ages of the people in the video tape or 2) whether the depictions in the video tape were of real people or were morphed images.

In this case, Inspector Welsh's affidavit provided Magistrate Judge Moulds with a substantial basis to conclude that the warrant was supported by probable cause. In the affidavit, Inspector Welsh set forth in detail his training and investigative experience in the areas of child pornography, child sexual exploitation, and molestation. (SW Aff. ¶¶ 2-12). Inspector Welsh stated that he has had training in "identifying and approximating the age of models, actors, and victims depicted in pornographic materials and investigating

violations of federal and state laws relating to the sexual exploitation of minors." (*Id.* ¶ 2). These statements are sufficient to establish Inspector Welsh's qualifications to give the magistrate judge a description of the contents of the video tape. *Cf. United States v. Ruddell*, 71 F.3d 331, 334 (9th Cir. 1995) (referring to an affidavit from a postal inspector making statements similar to those of Inspector Welsh regarding her training in the area of sexual exploitation of minors as an expert declaration).

In the affidavit, Inspector Welsh gave a detailed factual description of the contents of the video tape ordered by defendant and stated that the video contained child pornography as defined in 18 U.S.C. § 2256(2). (SW Aff. ¶ 56); *see United States v. Chrobak*, 289 F 3d 1043, 1045 (8th Cir. 2002) (citing *New York v. P. J. Video, Inc.*, 475 U. S. 868, 873-74 (1986)) (stating that in making a determination as to whether images are child pornography, "the judge must either view the images or rely on a detailed factual description of them."). Inspector Welsh also stated that the video "depicts a nude juvenile female, approximately 10 to 13 years of age, engaged in sexually explicit conduct" and went on to describe that conduct in detail. (*Id.*); *cf. United States v. Brunette*, 256 F.3d 14, 17 (1st Cir. 2001) (finding that probable cause to believe that an image was child pornography did not exist when the affiant merely "parroted" the applicable statutory definition without a description of the images). As the Ninth Circuit has noted, "[c]ommon sense suggests that most of the time one can tell the difference between a child and an adult." *United States v. Weigand*, 812 F.2d 1239, 1243 (9th Cir. 1987).

It was also reasonable for Magistrate Judge Moulds to infer from Inspector Welsh's description of the tape that it depicted actual people, not morphed images. *See United States v. Rowland*, 145 F.3d 1194, 1205 (10th Cir. 1998) ("In making the probable cause determination, the issuing magistrate may draw reasonable inferences from the material provided in the warrant application."). Absent any evidence to the contrary, it is reasonable to infer that when someone refers to a "female," as Inspector Welsh did in the affidavit, he or she is referring to an actual person rather than a morphed image. While defendant may be able to prove at trial that the images contained in the video tape were in fact morphed, that does not compel the conclusion that probable cause did not exist to support the issuance of the search warrant. *See, e.g., Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir. 1988) (noting that "[t]he state's failure to prove guilt beyond a reasonable doubt does not mean in connection with the arrests that it did not meet the lesser probable cause standard").

Because Inspector Welsh was qualified to estimate the ages of the people depicted in the video tape, because Inspector Welsh set forth a detailed description of the contents of the video tape, and because the inference that the video tape contained real people was reasonable, Magistrate Judge Moulds had a substantial basis for concluding that the warrant in this case was supported by probable cause as to the video tape.

2. *Items Other than the Video Tape*

Defendant next contends, relying on *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1991), that probable cause did not exist to support the issuance of the search warrant for items in defendant's home other than the

video tape itself.[1] Defendant's argument on this point is moot because the Government has stated that it will not admit any of the items, other than the video tape, that were seized from defendant's home at trial. (Gov't Opp'n at 13). Accordingly, the court need not reach the issue of whether Magistrate Judge Moulds had a substantial basis for concluding that the warrant to search for items other than the video tape was supported by probable clause.

B. *Validity of Consent to Search Defendant's Computer*

Second, defendant contends that any consent obtained from him to search any of his belongings was not given voluntarily. This argument is also moot because the Government will not offer any evidence taken from the defendant's residence at trial other than the video tape. Accordingly, the court need not address the validity of defendant's consent.

C. *Anticipatory Search Warrant*

Third, defendant contends that the search warrant in this case was a "forthwith" warrant, not an "anticipatory warrant," and that it is deficient because it was issued without a requirement, that a crime be committed before the search of defendant's house. An antici-

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[1] In *Weber*, the Ninth Circuit held that boilerplate recitations in a warrant affidavit that child pornography collectors, child molesters, and pedophiles were likely to keep certain things such as diaries and sexual aids at their residences were insufficient to establish probable cause to search for those items. *Id.* at 1345. The court noted that the defendant did not deny that probable cause existed as to the pornographic materials that arrived at his home as a result of the Government's controlled delivery. *Id*. at 1343.

patory warrant authorizing a search for materials that would arrive as a result of a controlled delivery by the government is permissible. *See Weber*, 923 F.2d at 1343 n.5 (citing *United States v. Hale*, 784 F.2d 1465, 1468-69 (9th Cir. 1986)). "[I]n order to comply with the Fourth Amendment, an anticipatory search warrant must either on its face or on the face of the accompanying affidavit, clearly, expressly, and narrowly specify the triggering event." U*nited States v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998); *see also Ramirez v. Butte-Silver Bow Count*y, 298 F.3d 1022, 1026 (9th Cir. 2002) ("[A] warrant may be construed with reference to the affidavit . . . if (1) the affidavit accompanies the warrant and (2) the warrant uses suitable words of reference which incorporate the affidavit.") (internal quotation and citation omitted). The warrant and its attachments must be in the immediate possession of those executing the search "in order to guide their actions and to provide information to the person whose property is being searched." *Id.*

In this case, while the word "anticipatory" was handwritten on the face of the warrant, the triggering event, the delivery of the video tape, was not included on the face of the warrant. However, the triggering event is specified in the affidavit attached to the warrant. (SW Aff. ¶¶ 14, 61). The warrant incorporated the affidavit by reference. (SW (referring to "attached affidavit")). The warrant and affidavit were also in the immediate possession of the officers while they searched defendant's residence. (Tr. Welsh Test. at 52:8-10 (stating that he had the affidavit with him at the search and that the other members of the team were made aware of the

contents of the affidavit)).[2] Thus, the officers complied with the requirements set forth by the Ninth Circuit in *Hotal* and *Ramirez*.

Defendant argues that *Hotal* also requires the affidavit to be presented with the warrant to the people whose property is being searched. The government has stipulated that the affidavit was not presented to defendant or his wife or left at the premises. (Hr'g Tr. Oct. 23, 2002 at 3:21-4:12). Both the *Hotal* and *Ramirez* courts emphasized that one of the purposes of requiring officers to maintain the warrant and its attachments in their immediate possession while conducting a search is "to provide information to the person whose property is being searched." *Id.*; *see also Ramirez*, 298 F.3d at 1027 ("To stand a real chance of policing the officers' conduct, individuals must be able to read and point to

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[2] Defendant argues that this evidence is insufficient; however, he presents no evidence to the contrary. Inspector Welsh testified that he carried the warrant with him in his jacket pocket folded into thirds. Defendant points out that the affidavit was not attached to the copy of the warrant that was given to defendant's wife after the search. In light of Inspector Welsh's testimony that the affidavit was present, the court will not draw the inference that the affidavit was not at the search based on defendant's speculative argument about whether or not a document of that length could be carried in the way Inspector Welsh said it was. Also, the conclusion that the affidavit was not present at the search does not follow from the fact that it was not attached to the copy given to defendant's wife. The officers may have removed the affidavit before giving the copy to her or carried it separately from the warrant itself. In *Hotal*, defendant made the argument that the affidavit was not present at the search, and the court noted that the government was aware of the argument but still offered no evidence that the affidavit accompanied the warrant at the search, and did not even make an argument to that effect. *Hotal*, 143 F.3d at 1126. That is not the case here.

the language of a proper warrant."). Given this purpose, it is logical that officers would be required to actually present the affidavit setting forth the triggering event to the people whose property they are searching in order to provide those people with information regarding the parameters of the search.

However, the *Hotal* court did not reach the issue of whether officers must present the affidavit to the people whose property is being searched. Instead, the Ninth Circuit held that the warrant in *Hotal* was, deficient because there was no evidence that the officers brought the affidavit with them to the search or that it "in any manner accompanied the warrant." *Id.* at 1225. Therefore, while *Hotal*'s underlying reasoning might support defendant's argument that the affidavit setting forth the triggering event for an anticipatory warrant must be presented to the people whose property is being searched, the law has not, yet reached the point where such presentment is required. This court will not extend *Hotal*'s reasoning to require presentment in the absence of specific guidance from the Ninth Circuit.

D. *Rule 41(d)*

Fourth, defendant argues that evidence obtained from the search of his residence should be suppressed because Federal Rule of Criminal Procedure 41(d) was violated. Rule 41(d) requires that "[t]he officer taking property under the [search] warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken . . ." The Ninth Circuit has held that "[a]bsent exigent circumstances, Rule 41(d) requires service of the warrant at the outset of the search on persons present at the search of their premises." *United States v. Gantt*, 194 F.3d 987, 990 (9th Cir. 1999).

Defendant contends that Rule 41(d) was violated in this case because defendant was not presented with a copy of the warrant at the outset of the search. Defendant was first approached by officers outside his residence at approximately 7:25 A.M. on April 19, 2002. He was not given a copy of the warrant until Inspector Welsh put a copy of the warrant down on defendant's dining table at approximately 7:53 A.M.

The government contends that the actions taken by the officers before defendant was given a copy of the warrant were part of a protective sweep and did not constitute a search. Because the purpose of a protective sweep is to protect the arresting officers, it is "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger. . . ." *Maryland v. Buie*, 494 U.S. 325, 355-56 (1990); *see also United States v. Furrow*, 229 F.3d 805, 812 (9th Cir. 2000) (A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.") (citation omitted), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001).[3]

During the approximately thirty-minute time lapse before defendant was shown a copy of the warrant, the officers looked through defendant's children's backpacks and began taking photographs and making

[3] In *Johnson*, the only part of *Furrow* that was overruled was its holding that a district court's determination of where the curtilage ends should be reviewed for clear error.

sketches of the house. (Tr. Welsh Test. at 47:6-48:1). Inspector Welsh testified that he checked the backpacks "as per safety procedures and to make sure that nothing was leaving the house" in order to get the children to school on time. (Tr. Welsh Test. at 47:17-19). Looking in the children's backpacks and photographing and sketching the house constituted a search because these actions went beyond the cursory visual inspection allowed by the protective sweep doctrine. Clearly, a person who might potentially pose a danger to the officers could not be hiding in a child's backpack.[4] In addition, photographing and sketching the house has no obvious relationship to the safety of the officers performing the search.[5] Accordingly, because a search

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[4] The Ninth Circuit has noted that *Buie* may call into question its case law allowing protective sweeps for the purpose of preventing the destruction of evidence. See *United States v. Johnson*, No. 92-30278, 1993 WL 385433, at *4 n.1 (9th Cir. Sept. 29, 1993) (stating that the court "need not decide . . . whether *Buie* overruled our previous decisions allowing protective sweeps to prevent the destruction of evidence . . . .") (internal citation and quotation omitted). Even if the Ninth Circuit's pre-*Buie* cases allowing protective sweeps to prevent the destruction of evidence are still good law, the Ninth Circuit has also stated that while performing the cursory inspection allowed by the protective sweep doctrine, "officers may only seize evidence found in plain view." *Id.* Any evidence in defendant's children's backpacks in this case would not be in plain view and thus the search of the backpacks was outside the scope of the protective sweep doctrine.

[5] Additionally, the crime for which defendant was investigated and subsequently arrested was not one that would lead to the conclusion that defendant would pose a high risk of danger to arresting officers. *See Furrow*, 229 F.3d at 812 (noting that in *Buie*, the Supreme Court, in defining the protective sweep, emphasized "the seriousness of the crime involved, and the need for law enforcement to protect themselves by securing the scene and

took place before defendant was shown a copy of the search warrant, Rule 41(d) was violated.

However, the determination that there was a violation of Rule 41(d) does not end the inquiry because a violation of Rule 41(d) does not necessarily require suppression. *Gantt*, 194 F. 3d at 994. "Under Ninth Circuit law, 'technical.' violations of Rule 41(d) require suppression only if there was a, 'deliberate disregard of the rule' or if the defendant was prejudiced." *Id.* (quoting *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1283 (9th Cir. 1992)). The court must therefore determine whether the failure to give defendant a copy of the warrant at the outset of the search in this case was done in deliberate disregard of Rule 41(d) or resulted in prejudice to defendant.

Whether the conduct of searching officers constitutes a violation of Rule 41(d) is a fact-based inquiry. *See, e.g. id.* at 994-95 (considering the facts surrounding the Rule 41(d) violation in determining whether the officers deliberately disregarded the rule); *United States v. Stockheimer*, 807 F.2d 610, 613-14 (7th Cir. 1986) (same). In *Gantt*, the Ninth Circuit held that the Rule 41(d) violation was deliberate because the officers failed to show the defendant the complete warrant even after she asked to see it.[6] *See id.* (rejecting government's

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preventing surprise attacks by coconspirators.") (citing *Buie*, 494 U.S. at 333).

[6] The court has found little case law as to what constitutes "deliberate disregard" in this context. *Gantt* is the most enlightening Ninth Circuit case on the issue. In most of the other cases, the courts simply look to the facts of the particular case in determining whether there was deliberate disregard of the rule. For example, in *United States v. Choi*, Nos. 98-10080, 98-10101, 98-10122, 1999 WL 386660, at *2 (9th Cir. May 21, 1999), the Ninth Circuit held

argument as to why Attachment A, listing items to be seized, was not shown to the defendant when she asked to see the warrant). In this case, there is no evidence that defendant asked to see the warrant before a copy was shown to him at the dining table by Inspector Welsh.[7] In addition, the officers had nothing to gain by disregarding the rule in this case. Therefore, the officers in this case did not deliberately disregard Rule 41(d).

Furthermore, there is no evidence that defendant has been prejudiced in any way by the Rule 41(d) violation. *See United States v. Johns*, 948 F.2d 599, 604 (9th Cir. 1991) (stating that prejudice in the Rule 41(d) context means that the "search might not have occurred or

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that a violation was deliberate where the government had not trained its agents to leave a copy of affidavits that cured facially overbroad warrants with the warrants. There is no similar allegation here regarding lack of training.

[7] Defendant's wife testified that when she got back from taking the children to school, she repeatedly asked the officers "What's going on?" (Tr. Bradstreet Test. at 70:14-71:9, 72:18 22). She also testified that she did not receive a copy of the warrant until the officers left the residence. (*Id.* at 72:23-73:18). It is unclear what time it was when defendant's wife began asking the officers what was going on. She testified that when she got back from the school, the officers and her husband were already in the house. (*Id.* at 69:22-25). Because Inspector Welsh put the copy of the search warrant on the table shortly after entering the house with defendant and preparing to interview him, it is likely that defendant's wife did not start questioning the officers as to what was happening until after her husband had been shown the warrant. In addition, unlike the defendant in *Gantt*, defendant's wife did not specifically ask to see the warrant. Taken together with the fact that defendant never asked to see the warrant, his wife's testimony does not justify a reasonable inference that the officers' Rule 41(d) violation was deliberate.

would not have been so abrasive if the rule had been followed"). Accordingly, the technical violation of Rule 41(d) that occurred in this case does not require suppression.

E. *Alleged* Miranda *Violation*

Finally, defendant contends that statements he made to Inspector Welsh before he received *Miranda* warnings should be suppressed. "The Supreme Court's holding in *Miranda* . . . generally precludes the evidentiary use of statements resulting from a custodial interrogation unless the suspect has first been advised of his or her constitutional rights." *Alvarado v. Hickman*, No. 00-56770, 2002 WL 31829483, at *3 (9th Cir. Dec. 18, 2002) (citations omitted). The question of whether a person is in custody is answered by looking at the totality of the circumstances. *Id.* (citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). "Based upon a review of all the pertinent facts, the court must determine whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981) .

The government has acknowledged that, prior to the time Inspector Welsh approached defendant outside his residence, defendant was detained by law enforcement officers. (Gov't Response to Def.'s Br. after Hr'g on Mot. to Suppress Evidence at 8-9). The government concedes that "'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" (*Id.* at 9 (citing *United States v. Mendenhall*, 466 U.S. 544, 554 (1979))). This concession that defendant was not free to leave is tantamount to a concession that defendant was, in fact, in custody.

The court must next determine whether the incriminating statements defendant made before he received the *Miranda* warnings were the result of interrogation. The Supreme Court has held "that interrogation may be 'either express questioning or its functional equivalent,' and defined the latter to include any statements or actions 'that the police should know are reasonably likely to elicit an incriminating response from the suspect."' *Booth*, 669 F.2d at 1237 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)).

In this case, Inspector Welsh approached defendant and immediately said, "You know why we're here." (Welsh Decl. ¶ 8; Tr. Welsh Test. at 45:l8-46:9).[8] Defendant responded that he did and that the package was in the garage. (Tr. Welsh Test. at 46:10-14). Inspector Welsh's statement could at most be found to be likely to elicit a "yes" or "no" statement from defendant as to whether he knew why the officers were there. Inspector Welsh could not have known that defendant

[8] Inspector Esteban testified that Inspector Welsh said, "'You know why we're here, don't you?"', (Tr. Esteban Test. at 20:13-16), or "'Do you know why we're here?"' (*Id.* at 25:14-26:6). In response to the government's question as to whether Inspector Esteban was unsure about whether Inspector Welsh asked defendant a question, Inspector Esteban testified that he was nervous and then stated that he was not unsure and that Inspector Welsh had approached defendant and "words were exchanged." Inspector Welsh, however, specifically stated that he did not make a statement to defendant in the form of a question because he did not want to ask any questions before issuing *Miranda* warnings. (Tr. Welsh Test. at 46:1-9). In light of Inspector Welsh's testimony that he did not ask defendant a question and Inspector Esteban's apparent failure to remember exactly what Inspector Welsh said, the court finds that Inspector Welsh made a statement to defendant outside his residence and did not ask him a question at that time.

would have responded to the statement by giving the location of the package containing the tape. Therefore, Inspector Welsh's statement to defendant outside his residence did not constitute interrogation. Accordingly, because defendant's statement regarding the location of the package was not the result of interrogation, suppression of the statement is not required.

IT IS THEREFORE ORDERED that defendant's motion to suppress be, and the same hereby is, DENIED.

DATED: January 15, 2003

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

United States District Court
EASTERN DISTRICT OF CALIFORNIA

In the Matter of the Search of
(Name, address or brief description of person or property to be search)

ANTICIPATORY SEARCH WARRANT

Residence of Jefferey Grubbs
1199 Park Terrace Drive **CASE NUMBER: SW-02-0061 JFM**
Galt, CA 95632

TO: **Gary R. Welsh, United Statess Postal Inspector**, and any Authorized Officer of the United States

Affidavit(s) having been made before me by who has reason to believe that ( ) on the person of or (X) on the premises known as (name, description and/or location)
residence of Jeffrey Grubbs, 1199 Park Terrace Drive, Galt, CA 95632, as more particularly described in Attachment A to the attached Affidavit,
in the Eastern District of California there is now concealed a certain person or property, namely (describe the person or property to be seized)
the records and materials described in Attachment B to the attached Affidavit.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed or the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED TO SEARCH ON OR BEFORE April 27, 2002
DATE

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search **in the daytime - 6:00 A.M. - 10:00 P.M. -** and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken and prepare a written inventory of the person or property seized and promptly return this warrant to JOHN F. MOULDS as required by law. U.S. Judge or Magistrate Judge

April 17, 2002 1:47p.m at **Sacramento, California**
Date and Time Issued City and State

JOHN F. MOULDS, U.S. Magistrate Judge /s/ John F. Moulds
Name and Title of Judicial Officer Signature of Judicial Officer

ATTACHMENT A

DESCRIPTION OF PROPERTY TO BE SEARCHED

The premises known as 1199 Park Terrace Drive, Galt, CA 95632 is a two-story house located on the east side of Park Terrace Drive. The front of the structure faces west and is a corner house on the intersection of Park Terrace Drive and CA State Route 104. The house is gray with white trim. Facing the property from Park Terrace Drive, there is a large tree to the immediate right (south) of the driveway. A lawn and large shrubs generally separate the front of the house with the sidewalk and street to the west. To the north, a large red masonry wall separates the property from State Route 104. All the windows, both first and second floors, that face Park Terrace Drive are multi-paned windows trimmed in white. The structure's tri-level roof is constructed of Spanish tile. The attached two-car garage is set forward of the main dwelling on the south side of the house and has white paneled roll-up door. The front door is white and is set up underneath an overhanging porch. The numbers "1199" made of a brass-appearing material are affixed just to the upper left of the garage door.

ATTACHMENT B

LIST OF ITEMS TO BE SEIZED

1. VHS Videotape entitled "Lolita Mother and Daughter" with the initials "GW" and the date "4-9-02."

2. Cardboard videotape cassette sleeve printed bearing "SONY 6 hrs (EP) Premium Grade T-120 VHS."

3. U.S. Postal Service cardboard mailing container addressed to "Jeff Grubbs, 1199 Park Terrace Drive, Galt, CA 95632, "with a return address of J. E., P.O. Box 1353, Huron, SD 57350, and packing paper originally contained within.

4. Any and all Web TV systems and components, including but not limited to, receiver boxes, keyboards, cables, monitors, instruction manuals, and storage containers.

5. Any and all records, documents or materials, including correspondence pertaining to the possession or receipt of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

6. Any and all books and magazines containing visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

7. All originals and all copies and all negatives of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

8. Any and all motion picture films and video cassettes of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States

Code, Section 2256(2), or video recordings which are of or pertain to sexually explicit images of minors or child pornography even if self produced.

9. Any and all records documents or materials including envelopes, letters, and other correspondence offering to transmit through interstate commerce including by United States Mails or by computer, any visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18 United States Code, Section 2256(2).

10. Any and all records documents or materials including any and all envelopes, letters, and other correspondence identifying persons transmitting, through interstate commerce including by United States Mail or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

11. Any and a11 records documents or materials including any and all books, ledgers, and records relating to the production reproduction, receipt, shipment, order, requests, trades, purchases, or transactions of any kind involving the transmission, through interstate commerce including by United States Mails or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined by Title 18, United States Code, Section 2256(2).

12. Any and all records documents or material including any and all address books, mailing lists, supplier lists, mailing address labels, computer password documentation, and any all documents and records pertaining to the preparation, purchase, and acquisition of names or lists of names to be used in connection with purchase, sale trade, or transmission, through inter-

state commerce including by United States Mail or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined in Title 18, United States code, Section 2256(2).

13. Any and all records documents or materials including any and all address books, names, and list of names and addresses of minors visually depicted while engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2) .

14. Any and all records, documents or materials including any and all materials and photographs depicting sexual conduct, whether involving minors or between adults and minors.

15. Any and all records, documents or materials pertaining to an interest in child pornography or sexually explicit images of minors.

16. Any and all undeveloped or processed film.

United States District Court
EASTERN DISTRICT OF CALIFORNIA

In the Matter of the Search of
(Name, address or brief description of person or property to be search)

APPLICATION AND AFFIDAVIT FOR ANTICIPATORY SEARCH WARRANT

Residence of Jefferey Grubbs
1199 Park Terrace Drive
Galt, CA 95632

CASE NUMBER: SW-02-0061 JFM

I, **Gary R. Welsh, United States Postal Inspector**, being duly sworn depose and say:

I am a **United States Postal Inspector** and have reason to believe that ( ) on the person of (X) on the property or premises known as (name, description and/or location) **residence of Jeffrey Grubbs, 1199 Park Terrace Drive, Galt, CA 95632, as more particularly described in Attachment A to the attached Affidavit,**
in the Eastern District of California there is now concealed a certain person or property, namely (describe the person or property to be seized)
the records and materials described in Attachment B to the attached Affidavit,
which is (state one or more bases for search and seizure set forth under Rule 41 (b) of Criminal Procedure)
evidence of the commission of criminal offenses, and fruits and instrumentalities of such offenses,
concerning a violation of Title 18 United States Code, Section 2252(a)(2), facts to support a finding of Probable Cause as follows:
See attached Affidavit of Gary R. Welsh, Postal Inspector.
Continued on the attached sheet and made a part hereof. (X) Yes ( ) No

/s/ Gary R. Welsh
Signature of Affiant
GARY R. WELSH, Postal Inspector

Sworn to before me, and subscribed in my presence

April 17, 2002 at **Sacramento, California**
Date City and State

JOHN F. MOULDS
United States Magistrate Judge
Name and Title of Judicial Officer

/s/ John F. Moulds
Signature of Judicial Officer

AFFIDAVIT

1. I, Gary R. Welsh, am a Postal Inspector with the United States Postal inspection Service (USPIS), and I have been so employed for approximately 17 years. As part of my duties, I am presently assigned to the Northern California Division as the Child Sexual Exploitation Specialist responsible for investigating those cases involving the transportation via mail of child pornography and other materials declared obscene, and use of the mails to further schemes to sexually exploit minors. I have conducted numerous investigations involving the illegal use of the mails to distribute obscene materials and child pornography. I received a Bachelor of Arts degree in political science from Antioch University in 1982, and an Associate in Arts degree in Administration of Justice from Monterey Peninsula College in 1984 .

2. I have received specialized training in the area of child pornography, child sexual exploitation and molestation. I have had training in identifying typology useful in understanding, profiling and identifying violators and projecting their behavior. Also, I have had training in identifying and approximating the ages of models, actors and victims depicted in pornographic materials and investigating violations of federal and state laws relating to the sexual exploitation of minors. During my training, I have received formal instruction from U.S. Postal Inspectors, Assistant U.S. Attorneys, and Trial Attorneys from the U.S. Department of Justice, Obscenity Enforcement Unit. I am currently a member of the United States Attorney's Child Pornography/Exploitation Task Force for the Northern District of California.

3. Additionally, I have received training from psychologists, special agents from the Federal Bureau of Investigation's Behavioral Science Unit, and others who have done extensive work and/or research in investigating the sexual exploitation of children. I have investigated and/or participated in numerous investigations specifically focused on recovery of evidence of the sexual exploitation of children and executed federal search warrants of which I was the affiant and lead agent.

4. I have participated in the execution of numerous state search warrants and consent searches of locations where alleged violators were believed to have secreted the evidence of sexual exploitation of children. During these investigations, I have examined hundreds of photographs, which depict children engaged in sexual activity.

5. During the course of previous investigations, I have had the opportunity to read and examine hundreds of letters and E-mail messages between individuals describing their admitted sexual contact with children and the manner in which they exploited children for sexual gratification. I have examined hundreds of letters and E-mail messages written by individuals describing their admitted sexual fixation with children and the detailed explicit manner in which they, given the opportunity, would exploit said children for sexual gratification.

6. Between February 6-10, 1989 and March 12-16, 1990, I attended child pornography investigation advance training sessions conducted by the U.S. Postal Inspection Service at Washington, DC. Between March 18-22, 1991, I attended the U. S. Department of Justice Child Sexual Abuse Symposium at Huntsville, AL.

Further, I have continued to provide assistance and information to city, county and federal law enforcement agencies involved in similar investigations.

7. Between January, 23-28, 2000, I attended a U.S. Department of Justice sponsored training program in Orlando, FL. This training primarily focused on investigations of on-line Internet child sexual exploitation and the trafficking in child pornography.

8. Between February 3-4, 2000, I attended a U.S. Postal Inspection Service Internet Crimes training program in San Francisco, CA. This training primarily focused on investigations of on-line Internet and E-mail crimes and child sexual exploitation and the trafficking in child pornography on the Internet.

9. Between August 20-25, 2000, I attended the 12th annual Crimes Against Children Training Conference co-sponsored by the U.S. Postal Inspection Service, Dallas, TX Police Department and the Dallas, TX Children's Advocacy Center. During this training conference I received in-service training in the following areas: child pornography and Child Erotica, case studies in investigating organized child pornography rings, Internet investigations, on-line undercover tracking of child sex offenders, legal and prosecutive considerations in child exploitation investigations, U.S. Department of Justice legal update regarding child sexual exploitation case law and U.S. DOJ policy regarding investigating and prosecuting child sexual exploitation cases, and medical and forensic aspects of child sexual exploitation investigations.

10. Between February 27-28, 2002, I attended a computer child pornography exploitation investigations training class instructed at the South Bay Regional

Public Safety Training Academy in San Jose, CA. This training primarily focused on undercover investigations involving child sexual exploitation and the trafficking in child pornography on the Internet.

11. I have investigated and/or participated in approximately fifty investigations specifically focused on recovery of evidence of possession, production and/or distribution though the U. S. Postal Service of images of minors engaged in sexually explicit activity. I have participated in the execution of approximately twenty search warrants in which I was the affiant and lead agent in the investigation.

12. As part of my duties I investigate cases involving the sexual exploitation of minors (child pornography) and the use of interstate commerce, including the U.S. Mail, to transport, distribute, possess, receive and produce images. As part of my duties, I investigate violations of 18 U.S.C. §§ 2251 and 2252.

13. I am currently investigating a matter in which I have probable cause to believe Jeffery Grubbs is in violation of Title 18, United States Code, § 2252 (a) (2), which makes it a federal offense for any person to knowingly receive, or attempt to receive, images of minors engaged in sexually explicit conduct.

14. The statements contained in this affidavit are based in part on information provided by other Postal Inspectors, state and local law enforcement officers, and on my own experience and background. This affidavit is in support of a request for an anticipatory search warrant to search the residence of Jeffery Grubbs, 1199 Park Terrace Drive, Galt, CA 95632. As described in detail below, Grubbs ordered a videotape containing child pornography from an undercover law

enforcement officer, who was posing as a seller of such videotapes on the Internet. The U.S. Postal Inspection Service will deliver a package containing the child pornography videotape to the residence of Jeffery Grubbs located at 1199 Park Terrace Drive, Galt, CA 95632. Law enforcement officers will conduct surveillance of Grubb's residence at the time of the videotape delivery. If Grubbs or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632, the search warrant will be executed.

15. Based upon my training and experience, and that of officers and agents with whom I have conferred, I am aware that Internet and computer technology have revolutionized the way individuals can communicate and obtain, and/or cause to be distributed, sexually explicit depictions of children. It has also revolutionized the way in which pedophiles, and others, who transact in sexually explicit depictions of children, interact with each other. The distribution of child pornography may be accomplished through a combination of personal contact, computer hookups, mailings and telephone calls. Any reimbursement would follow these same paths.

16. Persons who transact in sexually explicit images of minors often rely on personal contact, Internet e-mail, U.S. Mail, and telephonic communications, in order to sell, trade, or market those images. The development of the Internet and computer technology also allows for distribution of those images. A device known as a modem allows any computer to connect to another computer through the use of telephone lines. By connection to a host computer, electronic contact can be made to literally millions of computers around the world. A host computer is one that is attached to a

dedicated network and serves many users. These host computers are sometimes commercial online services, which allow subscribers to dial a local number and connect to a network, which is in turn connected to their host systems.

17. These service providers allow electronic mail service between subscribers and sometimes between their own subscribers and those of other networks or on the Internet. The Internet and telephone communication opportunities are ideal for the persons involved in transactions of sexually explicit depictions of children. The open and relatively anonymous communication allows the person to locate others of similar inclination and still maintain a degree of anonymity. Once contact is established, it is then possible to send text messages and graphic images.

18. In addition to the use of large service providers, persons transacting in sexually explicit depictions of children can use standard Internet connections, such as those provided by businesses, universities, and government agencies to communicate with each other and to receive and distribute pornography. These communication links allow contacts around the world. Additionally, these communications can be quick, relatively secure and as anonymous as desired. These advantages are well known and are becoming the foundation of commerce between persons transacting in sexually explicit images of children.

19. Web TV is an Internet service provider (ISP) which is available for a fee. It allows Internet communication and access without the need for a separate computer at the users location. A customer connects a Web TV receiver to his television and to a telephone line, and then registers on-line. The customer operates

the Web TV service by means of a keyboard and remote control linked to the television and Web TV receiver. Since Web TV charges for its service, the registration process includes providing personal information as well as information about how payments will be made, usually via a credit card number. Web TV maintains records for each account showing personal information about the account holder such as name, address, screen name, billing and payment information.

20. Web TV's system keeps track of the telephone number from which it is accessed each time a subscriber logs in, and also maintains a usage log which keeps track of information about each session a subscriber uses. Web TV allows each customer storage space on its computer system that is used to store such items as e-mails that have been sent, read and saved, a history of websites that have been visited and information about each of those websites.

21. On December 4, 2001, Postal Inspector Eleanor M. Lubbe, assigned to the New York Metro Division of the U.S. Postal Inspection Service, placed an undercover advertisement on two separate internet Newsgroups entitled "alt.binaries.pictures.erotic.children" and "alt.sex.pedophile." The advertisement read as follows:

> I found this excellent website. I never even thought something like this was available. Anyone can reach it at http://[REDACTED] , all you need is some patience because they are somewhat paranoid. The code they gave me was EL550611. Use this code and I can get free credit for videos. When you e-mail this company with the above code. They will give you access. Thank you and enjoy.

22. Postal Inspector Ronald H. Miller assigned to the St. Paul Field Office, U.S. Postal Inspection Service, St. Paul, MN, assists in this undercover operation. Inspector Miller, using the alias, "[REDACTED]," is the undercover agent operating the website known as [REDACTED] at: the website URL http://[REDACTED].

23. On December 20, 2001, at 12:40 a.m., Inspector Miller received an e-mail message from an individual using the e-mail address, JTWAINSCOTT@Webtv.net. The individual sending the e-mail later revealed his identity to Inspector Miller as "Jeff Grubbs." The entire text of the e-mail received by Inspector Miller was simply, "e15550611."

24. On December 20, 2001, at 1:32 p.m., Inspector Miller sent the following e-mail reply to the JTWAINSCOTT@Webtv.net (Jeffery Grubbs):

> [REDACTED] Hi, I recognize your referal [sic]! To access our site to finalization will not occur without time. Ok, I'll admit a little paranoia about this, but hey, if this works we'll both find it worth it! You must assure me 1) that you'll not devuldge [sic] any of this should you ever decide not to go further and 2) That you are not associated to law enforcement of any type. This is very real and I have been doing this for over four years with many "satisfied" customers. If you decide it's not for you, it's kewl [sic], no hard feelings, just please keep you council of me, my tastes and my materials, deal? As you can see, someone refereed you. They are credited if you order, when time comes, you'll have the same opportunities to earn "free" credits. Note: I do not ship across U.S. boarders [sic], sorry, but it is a

> policy that I will not violate. If you live outside the U.S. please do no reply, I cannot help you! So . . . . . what you are awaiting for, your next Step: 1) Go to the "Invites Only" page . . . . you'll see a disclaimer not allowing you to go further . . . Take you pointer . . . . (cursor) and scan it over the "s" on "Invitees Only" at the top of the page. It should change to a finger . . . then click! 2) It will ask for a password . . . . . Your password is [REDACTED] (that is the numbers " [REDACTED]" letters "[REDACTED]" (small "[REDACTED]") and the numbers "[REDACTED]." If this works, email me back with your promises I required in the first paragraph to go to the next step. Thanks for your [sic] ;) interest! J.E.

25. On December 21, 2001, at 1:21 a.m., Inspector Miller received the, following e-mail message from Jeffery Grubbs:

> Subject: no subject
> I am not affiliated with any law enforcement of any type. Nor would I give up any information of your existence at any time.

26. On December 21, 2001, at 12:28 p.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs

> [REDACTED] Good job! This is how I've stratigized [sic] this site. Now you see we could cat [sic] anytime mono y mono, one on one. (Time agreed mutually). I do not deal over the phone, but I have found that this satisfies mine (and those certain in few of my customers that desires such interaction). If your curiosities got the better of you you probably tried to go further without success. Ok, if you click on

> Special Interests or Available Titles. I have deleted the Special Interests section but will show you the key to the Available Titles when you write back and tell me the following, 1) that your intest [sic] do go into the area of the taboo and forbidden. With your previous assurance, I am safe telling you that what I have is illegal, if you don't want this rare collectable material, do not reply!!!!!!! 2) that you understand that means this may evolve in your obtaining my, material if we get that far and that you do not live outside the USA, I send strictly through the U.S. Mail, they cannot open packages without a search warrant, I have discovered this and I do not give them reason to obtain one! It is safe, but I will not subject my materials to Customs (as I mentioned in the previous email) UPS or FED-EX because all three can open materials upon a whim. I am very safe and this is proof, I care not only for my safety but yours also! 3) You may refer my site to a likeminded friends [sic] but cannot give)out my passwords. Remember, this when you email me back! We will not go further without it. I have never had a problem before with my customers, shouldn't have one now.:) I wish you well and hope to hear back from you and I'll share my "stuff" and how you may enjoy with the rest of us likeminded! :)

27. On December 21, 2001, at 3:20 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re:
> My intrest [sic] in the taboo and forbidden is real. I live in the USA.

28. On December 24, 2001, at 10:01 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Happy Hunting!
> [REDACTED] You are at the final step, this is it! If we've :) connected, we will be your single rare site for you to find exclusive vids on many wonderful delights we are assured that you cannot find elsewhere! Included is your last password then you'll see what we have and offer. Remember the trust we've placed in you and have respect for us to not mention this to anyone but those you may assuredly know share our "like" interest ! ! ! ! At this point we are comfortable that we will not shock you with what we have. We feel we are unique, now come see what we have! At the "Available Titles" icon, click and type in: [REDACTED]. Hope to hear from you! [REDACTED]

29. The undercover website is constructed in such a way that once the proper password is typed as instructed, a previously hidden web page is revealed. This web page describes a collection of thirteen videotapes of depicting minors engaged in sexually explicit conduct. The descriptions include the ages of the participants, specific graphic descriptions of the sexual activity contained on each of the videotapes, the prices, detailed ordering instructions, and the address to mail the order and money. As described in Paragraphs 30 and 42 of this Affidavit, Jeffery Grubbs subsequently ordered a videotape listed in the webpage as "Lolita Mother and Daughter." The videotape is described on the webpage as follows:

> Lolita Mother and Daughter opens with a lovely young girl, ummmmmmm if she's over 10 I'd be shocked pleasing Mom with her finger. Mom's turn-she lays down daughter and pleases her with a huge dildo.

30. On December 27, 2001, at 9:21 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs. This message was forwarded through the undercover website subsequent to the completion of the order form blocks designed into website merchandise ordering page:

> Subject: Order Placement for Videos
> Importance: High
> FormsCheckbox3 = Lolita Mother and Daughter
> Name = Jeff Grubbs
> Address = 1199 Park Terrace Dr
> City = Galt
> State = CA
> Zip = 95632
> Email_address = JTWAINSCOTT@webtv.net

31. On December 31, 2001, at 7:55 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Thanks!
> [REDACTED] Thank you for your order . . . . Your selection are [sic] wonderful, you will not be disappointed . . . . I await you payment! J.E.

32. On January 8, 2002, at 7:16 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Order Placement for Videos
> This is simply to inform you that we have not received payment yet! Let us know if we can be of assistance to you! J.E. [REDACTED]

33. On January 9, 2002, at 5:04 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re: Order Placement for Videos
> Sent payment dec. [sic] 28 by US post if did not arive [sic] by now please email me

34. On January 9, 2002, at 12:34 p.m., INSPECTOR Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Re: Order Placement for Videos
> I do not know what to say, it has not arrived. J. E . [REDACTED]

35. On January 10, 2002, at 9:46 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Re: Order Placement for Videos
> I just checked again this a.m., nothing . . . where did you mail it to? J.E.

36. On January 12, 2002, at 7:52 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re: Order Placement for Videos
> [REDACTED] p.o. box [REDACTED] huron, sd 57359 Still want film will try one more time will mail today 01/0:12/002 [sic] hope it makes it thanks J Grubbs

37. On January 16, 2002, at 9:00 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Re: Order Placement for Videos

> Sorry J, I still haven't received it, I am flying to Thailand . . . :) in two days. I hope you order makes it before then! J.E.

38. On January 19, 2002, at 7:50 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re: Order Placement for Videos
> Do not know if you have left yet. If not hope it has made it please send word. Thanks JT

39. On January 26, 2002, at 8:12 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re: ?
> wondering of you ever got letter please let me know jtwainscott

40. On February 1, 2002, at 4:53 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re:
> just wondering if you ever got that

41. On February 5, 2002, at 9:40 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Re: Order Placement for Videos
> J.T. I just got: back from my Thailand trip. Have you ever been there? Wow, what a wonderful place to visit! I can give you suggestions if you ever want. to go! Four main areas for "fun" action . . . . enough of that now, just want to get this to you to let you know when I picked up the mail this a.m. I noticed your letter. Thanks, I will get to your order

as soon as possible, please be patient, I am a little backed up ok?:) Thanks! J. E.

42. On February 5, 2002, Inspector Miller received a U.S. Mail first class envelope in his undercover post office box in Huron, SD. The letter was postmarked in Sacramento, CA on January 12, 2002. Sacramento, CA is approximately 26 miles north of Galt, CA. The envelope contained $45.00 in U.S. Currency. Also contained the mailing envelope was a hand written letter which bore the following text: I hope this makes it to you please send film asap thanks Jeff Grubbs 1199 Park Tarrace [sic] Dr., Galt, CA 95632."

43. On February 5, 2002, at 3:10 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re: Order Placement for Videos
> Thanks! Just happy it got thare [sic] I have all the time in the world so take care of things hope you had grate [sic] time in tiland [sic] sounds like it looking forword [sic] to reciving [sic] from you thank you JT.

44. On March 8, 2002, at 5:40 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re: Looking forword [sic] to dilivery [sic]
> Have not receved [sic] order. Hope you have sent it know you were backed up after trip. Please let me know JTWainscott

45. On March 11, 2002, at 12:30 p.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Re: Looking forword [sic] to dilivery [sic]

> Sickness . . . . Accident . . . Snowstorm . . . . Sorry it was delayed, I will express it if you'd like at my charge! J.E.

46. On March 12, 2002, at 3:58 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re: Looking forword [sic] to dilivery [sic] No need for extra cost of expres [sic] shiping [sic] if you could send right away would be gratefull [sic] will be looking forword [sic] to it. Have next order in mind allredy [sic]. You will hear from me soon thanks. JT.

47. On March 26, 2002, at 11:46 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re: Lookingforword [sic] to dilivery [sic] Have not reseved [sic] order yet hope you have right addres [sic] 1199 park tarrace [sic] dr. Galt CA 95632 still looking forword [sic] to dilivery [sic] thanks JTWainscott

48. On March 29, 2002, at 4:46 p.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Re: Looking forword [sic] to dilivery [sic] Sorry, I have a major injury . . . . now surgery . . . : (I haven't forgotten you! will not disappoint you! Please forgive . . . this wasn't my choice! J.E.

49. On April 5, 2002, at 7:31 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re: Looking forword [sic] to dilivery [sic]

hopeing [sic] you had time to send please let me know JT

50. On February 7, 2002, I was informed by U.S. Postal Service Supervisor Robbin Kent of the Galt, CA, post office that Jeffery Grubbs was currently receiving mail delivery at 1199 Park Terrace Drive, Galt, CA 95632.

51. On March 28, 2002, I reviewed data compiled upon request by this agency from AutoTrack XP, Database Technologies, Inc., Boca Raton, Fl. AutoTrack XP is a public access information search system available through the Internet. AutoTrack XP records show Jeffery Grubbs, Social Security No. 573-45-8976, is most recently associated with the address of 1199 Park Terrace Dr , Galt, CA 95632. LexisNexis, also a public access information search system, lists Jeffery Grubbs at 1199 Park Terrace Drive, Galt, CA 95632. LexisNexis also associates the telephone number 209-745-5820 with Jeffery Grubbs at 1199 Park Terrace Drive, Galt, CA 95632 .

52. On March 29, 2002 I reviewed California Department of Motor Vehicles (DMV) records and determined that Jeffery Grubbs is listed as holding vehicle operator license, C2754695 and has a listed address of 1199 Park Terrace Drive, Galt, CA 95632.

53. On April 9, 2002, I was informed by Mark Coryell, of the California State Employment Development Division that state payroll tax withholding records reflect Jeffery Grubbs, with a date of birth of August 20, 1963, and California DMV operators number of C2754695, residing at 1199 Park Terrace Drive, Galt, CA 95632, with a listed telephone number of 209-745-5820. These facts are consistent with information

previously obtained from LexisNexis, AutoTrack XP, and California DMV.

54. On April 12, 2002, I was informed by Pacific Bell that the current telephone line for 1199 Park Terrace Drive, Galt, CA is 209-745-5820 and is listed to Jeffery Grubbs.

55. On April 12, 2002, I was provided information from WEBTV.com regarding the e-mail account associated with the e-mail address of JTWAINSCOTT @webtv.com. This information was provided pursuant to a federal grand jury subpoena served on WEBTV. com on April 10, 2002. WEBTV.com disclosed that the current billing name and address for the JTWAINSCOTT@webtv.com account is listed as Jeffery Grubbs, 1199 Park Terrace Dr., Galt, CA 95632. Additionally the subpoenaed information lists an account/ ANI telephone number of 209-745-5820. An ANI telephone number is the telephone line from which the WEBTV receiver is dialing from in order to access the internet.

56. The videotape requested by Jeffery Grubbs entitled "Lolita Mother and Daughter" contains child pornography (sexually explicit conduct as defined in Title 18, United States Code, Section 2256(2)). I have reviewed the videotape. It is approximately ten minutes and thirty seconds in length, in its entirety. It depicts a nude juvenile female, approximately 10 to 13 years of age, engaged in sexually explicit conduct with a nude adult female appearing to be approximately 20 to 30 years of age. This activity includes the lascivious exhibition of the minor female's genitals, digital penetration of the minor's vagina and anus by the adult female, oral-genital contact by both the adult and minor

female, and penetration of the minor female by a foreign object.

57. During the daytime or early evening hours, on or about April 18, 2002, an attempt will be made by Postal Inspectors to deliver a package containing a videotape entitled "Lolita Mother and Daughter," and previously referred to in paragraphs 29, 30 and 56 of this Affidavit. The videotapes will contain visual images of minors engaged in sexually explicit activity, as defined in Title 18, United States Code, Section 2256.

58. To prepare this videotape for mailing to Jeffery Grubbs, I scratched my initials "GW" and the date "4-9-02" into the plastic of the videotape cartridge under the retractable protective edge covering the magnetic tape. Affixed to the videotape is a label on which is handwritten, "Lolita Mother and Daughter." I placed the videotape cartridge within a cardboard videotape cassette sleeve printed with the words "SONY 6 hrs (EP) Premium Grade T-120 VHS." I then placed the videotape and sleeve inside a mailing envelope addressed to "Jeff Grubbs, 1199 Park Terrace Drive, Galt, CA 95632," with a return address of J. E., P.O. Box 1353, Huron, SD 57350. The package has a standard first class U.S. Postal Service postage meter strip and postmark for Huron, SD.

59. I and/or other postal inspectors pre-positioned at 1199 Park Terrace Drive, Galt, CA 95632 will keep the package under surveillance. Surveillance of the package will continue as the package is accepted by person(s) presenting themselves as the authorized recipients of correspondence and other items addressed or destined for delivery to 1199 Park Terrace Drive, Galt, CA 95632.

60. Surveillance of the package and person(s) accepting custody of the package will continue until such times as the package is taken into the residence located at 1199 Park Terrace Drive, Galt, CA 95632. If no one accepts the package at this address, on or about April 18, 2002, additional attempts will be made on each successive day (not including Sunday) until the final date for which the Magistrate Judge authorizes execution of this search warrant.

61. Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence located at 1199 Park Terrace Drive, Galt, CA 95632. At that time, and not before, this search warrant will be executed by me and other United States Postal inspectors, with appropriate assistance from other law enforcement officers in accordance with this warrant's command.

62. Based upon the foregoing facts, I respectfully submit there exists probable cause to believe that the items set forth in Attachment B to this affidavit and the search warrant, will be found in the premises located at 1199 Park Terrace Drive, Galt, CA 95632, which residence is further described at Attachment A. Your affiant requests authority to seize such items, as listed herein and in Attachment B, and, after searching, return all non-relevant materials (or copies thereof when not practical to return the original) within a 120 day period of time.

63. Additionally, based on my training and experience, and based upon the training and experience of other law enforcement officers with whom I have spoken, I have learned that persons committing crimes such as those described above will retain fruits, evi-

dence, and instrumentalities of their crime at their residence, on their person (such as film, video, and pictures), and located in their vehicle for extended periods of time.

64. Wherefore, I respectfully request that a warrant be issued authorizing the United States Postal Inspection Service, with appropriate assistance from other law enforcement officers, to enter the said premises and therein search for and seize the items set forth in this Affidavit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Gary R. Welsh
GARY R. WELSH
Postal Inspector

Approved as to form by:

/s/ Camil A. Skipper
CAMIL A. SKIPPER
Assistant U.S. Attorney

Subscribed to and sworn to
before me this 17th day of
April, 2002:

/s/ John F. Moulds
HON. JOHN F. MOULDS
United States Magistrate Judge

ATTACHMENT A

DESCRIPTION OF PROPERTY TO BE SEARCHED

The premises known as 1199 Park Terrace Drive, Galt, CA is a two-story house located on the east side Park Terrace Drive. The front of the structure faces west and is a corner house on the intersection of Park Terrace Drive and CA State Route 104. The house is gray with white trim. Facing the property from Park Terrace Drive, there is a large tree to the immediate right (south) of the driveway. A lawn and large shrubs generally separate the front of the house with the sidewalk and street to the west. To the north, a large red masonry wall separates the property from State Route 104. All the windows, both first and second floor, that face Park Terrace Drive are multi-paned windows trimmed in white. The structure's tri-level roof is constructed of Spanish tile. The attached two-car garage is set forward of the a main dwelling on the south side of the house and has white paneled roll-up door. The front door is white and is set up underneath an overhanging porch. The numbers "1199" made of a brass.-appearing material area affixed just to the upper left of the garage door.

ATTACHMENT B

LIST OF ITEMS TO BE SEIZED

1. VHS Videotape entitled "Lolita Mother and Daughter" with the initials "GW' and the date "4-9-02."

2. Cardboard videotape cassette sleeve printed bearing "SONY 6 hrs (EP) Premium Grade T-120 VHS."

3. U.S. Postal Service cardboard mailing container addressed to Jeff Grubbs, 1199 Park Terrace Drive, Galt, CA 95632,"with a return address of J. E., P.O. Box 1353, Huron, SD 57350, and packing paper originally contained within.

4. Any and all Web TV systems and components, including but not limited to, receiver boxes, keyboards, cables, monitors, instruction manuals, and storage containers.

5. Any and all records, documents or materials, including correspondence pertaining to the possession or receipt of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

6. Any and all books and magazines containing visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

7. All originals and all copies and all negatives of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

8. Any and all motion picture films and video cassettes of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States

Code, Section 2256(2), or video recordings which are of or pertain to sexually explicit images of minors or child pornography even if self produced.

9. Any and all records; documents or materials including envelopes, letters, and other correspondence offering to transmit through interstate commerce including by United States Mails or by computer, any visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18 United States Code, Section 2256(2).

10. Any and all records documents or materials including any and all envelopes, letters, and other correspondence identifying persons transmitting, through interstate commerce including by United States Mails or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

11. Any and all records documents or materials including any and all books, ledgers, and records relating to the production, reproduction receipt, shipment, orders, requests, trades, purchases, of transactions of any kind involving the transmission through interstate commerce including by United States Mails or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined by Title 18,United States Code, Section 2256(2).

12. Any and all records documents or materials including any and all address books, mailing lists, supplier lists, mailing address labels, computer password documentation, and any and all documents and records pertaining to the preparation., purchase, and acquisition of names or lists of names to be used in connection with the purchase, sale, trade, or transmission, through

interstate commerce including by United states Mail or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined in Title 18, United States code, Section 2256(2).

13. Any and all records documents or materials including any and all address books, names and list of names and addresses of minors visually depicted while engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

14. Any and all records, documents or materials including any and all materials and photographs depicting sexual conduct, whether involving minors or between adults and minors.

15. Any and all records, documents or materials pertaining to an interest in child pornography or sexually explicit images of minors.

16. Any and all undeveloped or processed film.

APPENDIX G

Fed. R. Crim. P. 41: Search and Seizure

(a) Scope and Definitions.

(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) Definitions. The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, any other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(**b) Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property

is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)—having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) Probable Cause. After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c).

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to

appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) Requesting a Warrant by Telephonic or Other Means.

(A) In General. A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant, a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and

the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) In General. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) Contents of the Warrant. The warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than 10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(C) return the warrant to the magistrate judge designated in the warrant.

(3) Warrant by Telephonic or Other Means. If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read

or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant.

(C) Modifications. The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.

(D) Signing the Original Warrant and the Duplicate Original Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Noting the Time. The officer executing the warrant must enter on its face the exact date and time it is executed.

(2) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

(3) Receipt. The officer executing the warrant must:

(A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or

(B) leave a copy of the warrant and receipt at the place where the officer took the property.

(4) Return. The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.